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Supreme Court of the United States

OCTOBER TERM, 1965

No. 985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT AS TO JURISDICTION

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Dated February 3, 1966

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I.

OPINIONS BELOW

The opinion of the State Corporation Commission of Virginia (Appendix A, p. 1) is reported at 1964 S.C.C. Rep. 95. The opinion of the Supreme Court of Appeals of Virginia (Appendix A, p. 16) is reported at 206 Va. 517, 145 S.E. 2d 227.

II.

JURISDICTION

This is an application for refund of taxes levied on the money and intangible personal property of the Appellant. It was brought before the State Corporation Commission of Virginia pursuant to § 58-1122 of the Code of Virginia of 1950. The application was denied by the Commission on December 15, 1964. Upon appeal, the Supreme Court of Appeals of Virginia affirmed the order of the Commission on November 29, 1965.[1] Notice of Appeal was filed in that court on December 13, 1965.

The contention of the Appellant from the very initiation of this proceeding has been that § 58-588 of the Code of Virginia of 1950, as amended by Chapter 217 of the Acts of Assembly of Virginia of 1964, and the statutes related thereto, are, as applied to the Appellant, in violation of the Constitution of the United States as depriving the Appellant of its property without due process of law and as depriving it of the equal protection of the laws (R. 3).[2] These ques-

[1] A petition for rehearing filed by the Appellee (the successful party below) that related only to costs on appeal was denied on January 17, 1966, and is in no event relevant to this appeal.

[2] References to (R. .....) are to the record as printed for the court below, nine copies of which have been filed with the Clerk of this Court.

tions were considered and determined adversely to the Appellant by both tribunals below.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257(2) and 2101(c) (1964 ed.). The former confers jurisdiction on this Court by way of appeal when the constitutionality of a State statute is brought into substantial question. This Court customarily receives cases from State courts relating to the constitutionality of State taxing statutes by the appellate route. *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959); *Butler Bros.* v. *McColgan,* 315 U.S. 501 (1942); *N. & W. Ry.* v. *North Carolina,* 297 U.S. 682 (1936). A State decision enforcing a State statute in a particular transaction against a timely claim of a Federal right is subject to review on appeal. *Fiske* v. *Kansas,* 274 U.S. 380, 385 (1927). That situation obtains in this case.

III.

STATUTES INVOLVED

The statute chiefly involved is § 58-588 of the Virginia Code (1959 Repl. Vol. 8, p. 580). Before its amendment by Chapter 217 of the Acts of Assembly of 1964, this section provided:

> "§ 58-588. Report required.—Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit natural gas in the public service by means of a pipe line or pipe lines in this State, which pays no State franchise tax on its gross receipts on account of the transmission of such natural gas shall report annually on or before the fifteenth day of April to the State Corporation Commission all of its real and personal property of every description, tangible and intangible, as of the beginning of the first day of January pre-

ceding, showing particularly in what city, town or county and school district therein the property is located. This report shall be itemized as provided for herein. Each such corporation shall also report the total miles of mains located in this State.

"The report herein required shall be verified by the oath of the president or other proper officer or person making the same."

As amended on March 10, 1964 (Va. Code, 1964 Cum. Supp., p. 145), this section now provides, the amendments being shown by italics:

"§ 58-588. Report required.—Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit natural gas *or crude petroleum and the products or by-products thereof* in the public service by means of a pipe line or pipe lines in this State, which pays no State franchise tax on its gross receipts on account of the transmission of such natural gas *or crude petroleum and the products or by-products thereof* shall report annually on or before the fifteenth day of April to the State Corporation Commission all of its real and personal property of every description, tangible and intangible, as of the beginning of the first day of January preceding, showing particularly in what city, town or county and school district therein the property is located. This report shall be itemized as provided for herein. Each such corporation shall also report the total miles of mains located in this State.

"The report herein required shall be verified by the oath of the president or other proper officer or person making the same.

"This section as amended shall apply to the tax year beginning on January first, nineteen hundred sixty-four and to each tax year thereafter."

Also relevant are §§ 58-593 and 58-594 of the Virginia Code (1959 Repl. Vol. 8, p. 581) as follows:

> "§ 58-593. Rate of State tax on intangibles. —The State tax on the intangible personal property (other than shares of stock and bonds issued by counties, cities and towns or other political subdivisions of this State), owned by every corporation falling under the provisions of this article, shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof.
>
> "§ 58-594. Rate of State tax on money.—The State tax on the money of every corporation coming under the provisions of this article shall be twenty cents on every one hundred dollars of the assessed value thereof."

It is the retroactive application of the amendment of § 58-588 to levy a tax on all of its intangibles, including those having a commercial domicile outside Virginia, of which the Appellant complains in this case.

IV.

QUESTIONS PRESENTED

The questions presented are two:

1. May a State levy a tax retroactively when the taxpayer could not have anticipated and would have avoided the tax? That is what Virginia did in this case and its action is in violation of the due process and equal protection clauses of the Constitution.

2. May a State levy a tax on the money and intangible personal property of a corporation incorporated under its laws (and those of another State) when that money and intangible personal property have acquired a commercial domicile outside the taxing State? Again, Virginia answered in the affirmative and again its action is unconstitutional for the same reasons.

V.

STATEMENT OF THE CASE

The facts of the case were for the most part stipulated by counsel (R. 38-42). Some additional evidence was introduced at the hearing before the Commission (R. 5-22). The constitutional questions were raised in the initial pleading (R. 2-3) and determined adversly to the contentions of the Appellant both by the Commission (App. A, pp. 7, 14) and by the court below (App. A, pp. 22, 26).

The Appellant, originally a Delaware corporation, became a corporation also incorporated under Virginia law as the result of merger so that it might condemn property in Virginia. It transports petroleum products by pipeline as a common carrier from Texas to New York.

The Appellant maintains a statutory office in Delaware and a registered office in Virginia. But these are purely for the purpose of statutory compliance. Its offices are in Atlanta, Georgia. There, its general books and accounting records are kept, there its officers live, there its affairs are managed and directed, there it bills and collects for its services, there its Board of Directors normally meets.

Virginia assesses and taxes public service corporations differently from other corporations. A public service corporation, until recently, paid a substantial franchise tax but no income tax; other corporations paid an income tax but only an insubstantial franchise tax. The physical property of a public service corporation is separately assessed by the State Corporation Commission; the property of other corporations is assessed by local officials. Intangible property of other corporations is taxed, in the case of domestic corporations, only to the extent that it has not acquired a business situs outside Virginia.

But at January 1, 1964, the tax day involved here, Vir-

ginia had not provided for taxation of a petroleum products pipeline company as a public service corporation. So the Appellant, it was generally understood, was to be taxed in 1964 in the same way as corporations that were not public service corporations. This, in essence, had been the explicit determination of the State Corporation Commission in the fall of 1963.[3]

So the Appellant expected to be taxed as a non-public service corporation in 1964. This would mean that substantially all of its money and intangibles, having a commercial domicile in Georgia, would not be subjected to taxation by Virginia. The Appellant therefore took no steps to minimize its tax liability to Virginia. All other utilites operating in Virginia do so minimize their taxes by converting their money and other intangibles in temporary excess supply to Federal bonds, notes and bills that are not subject to the Virginia tax. Such conversion is customary practice for Virginia utilities (R. 19). But the Appellant, believing itself immune from this tax, did not follow the conversion practice.

Then came the bombshell. The Virginia General Assembly, meeting *after* the tax day of January 1, 1964, adopted an amendment to § 58-588 purporting to tax a petroleum products pipeline like a natural gas pipeline. And this amendment, which became effective on March 10, 1964, was specifically made retroactive to January 1, 1964. Pursuant to this statute, Virginia purports to tax all money and intangible personal property, wherever located. By the time of initial introduction of this measure, much less its adop-

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[3] *Commonwealth* v. *Colonial Pipeline Co.*, 1963 S.C.C. Rep. 83. The assertion by the court below that this decision should have alerted the Appellant to possible changes in tax legislation (App. A, p. 22) is not supported by record, fact or logic; in fact, the Appellant's expectations were to the contrary (R. 15-16).

tion and effective date, it was too late for the Appellant to take steps to minimize its tax burden.

The result is entirely unfair. The Appellant was required to pay a tax of $123,450 on its intangible personal property and a tax of $38,979 on its money. The other Virginia utilities, railroads being excluded, were forewarned and avoided the tax. Varying through the years from 184 to 207 in number, they paid total taxes as follows:

Taxes on	*1961*	*1962*	*1963*	*1964*[4]	*1965*[4]
Intangible Property	$ 4,257	$ 5,815	$ 5,821	$30,631	$ 8,461
Money	45,431	45,156	50,052	48,409	50,318

The Appellant was thus required to pay in 1964 a tax on intangibles four times as large as all other utilities, except railroads, lumped together and a tax on money that was more than 80% of the tax levied on all others. The Appellant learned its lesson: in 1964, it paid Virginia pursuant to these taxes a total of $162,429; in 1965 it paid $761. And this remarkable variance was possible only because Virginia accepts avoidance of the tax by investment in Federal securities. The Appellant had no chance to avoid the tax in this manner in 1964.

This utterly unfair result impelled the Appellant to seek relief from the Virginia courts. It began, as Virginia requires, before the State Corporation Commission. It raised there the applicable Federal questions. It raised them equally in the court below. Both tribunals denied relief.

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[4] Excludes taxes levied on the Appellant.

VI.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1.

An Unexpected Retroactive Tax That Would Have Been Avoided Is Unconstitutional

This Court has held that the retroactive application of a gift tax is unconstitutional. *Blodgett* v. *Holden,* 275 U. S. 142 (1927); *Untermyer* v. *Anderson,* 276 U. S. 440 (1928). In the former, this Court said:

> "It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing." (p. 147)

In other words, the taxpayer did not expect the tax and could have avoided it by not making the gift.

Conversely, retroactive application of income and property taxes has been upheld by this Court. *Welch* v. *Henry,* 305 U. S. 134 (1938); *United States* v. *Hudson,* 299 U. S. 498 (1937); *Cooper* v. *United States,* 280 U. S. 408 (1930); *Philip Wagner, Incorporated* v. *Leser,* 239 U. S. 207 (1915). The reason for this is that no taxpayer would reasonably be expected to forego income or to dispose of property because of the subsequent imposition of a tax. In addition, especially in regard to the income tax, periodic retroactive revision—in fact, generally annual retroactive revision—is the rule rather than the exception and no taxpayer can reasonably contend that such a revision is unexpected. An income tax relates to a period of time, not a fixed tax day, as is the case of a property tax like that in question here.

The rule to be derived from these cases is this:

> "The primary consideration which appears from an analysis of the cases involving retroactive taxation is the ability of the taxpayer, at the time of the transaction in dispute, reasonably to have foreseen that a tax would be imposed, and the likelihood that having been able to foresee it, he could have altered his conduct to avoid the tax." Hochman *The Supreme Court and the Constitutionality of Retroactive Legislation* 73 Harv. L. Rev. 692, 706 (1960). *Cf. Cohan* v. *Commissioner,* 39 F. 2d 540 (2d Cir. 1930); *Wilgard Realty Co.* v. *Commissioner,* 127 F. 2d 514 (2d Cir. 1942); *United Business Corp. of America* v. *Commissioner,* 62 F. 2d 754 (2d Cir. 1933); *Prather* v. *Commissioner,* 322 F. 2d 931 (9th Cir. 1963).

The rule against retroactivity in taxation is thus two phased:

(a) The taxpayer on the tax day had no reasonable expectation that the tax would be imposed. The Appellant on the basis of the record here had no inkling that the tax would be imposed; it had every reason to believe that it would be taxed on an entirely different basis.

(b) The taxpayer, had it anticipated imposition of the tax, would and could have avoided the tax. The Appellant in this case could clearly have avoided the tax and as surely would have done so had it had any indication that the tax would be imposed. All of the other 202 utilities did substantially avoid the tax in 1964 and they were joined in 1965 by the Appellant in doing so. Virginia has never complained of this avoidance; it is accepted Virginia practice.

The court below refused either to recognize or to apply this rule. Its ruling in essence merely is that a limited retroactivity in any tax does not offend constitutional limitations.

That is not the rule established by the decisions of this Court, the decisions of lower Federal courts or by the text writers.

It is important that this Court make clear its views as to the permissible retroactive application of tax statutes. That necessity is emphasized by the unfairness to the Appellant of the tax as applied in this case. Taken unawares, it was required to pay almost twice as much as 202 other utilities paid together (Exhibit 2). Comparisons between taxpayers have limited usefulness, but they may be used to demonstrate gross inequity. Gross inequity is clearly indicated here.

Virginia did not accord to the Appellant here the equal protection of its laws; it deprived this taxpayer of substantial property without due process of law. This Court should establish a definitive rule as to retroactive taxation; it has an opportunity to do so here.

2.

A State May Not Tax Intangibles Of Its Corporation That Have Acquired Commercial Domicile Elsewhere

This Court held many years ago that a State of incorporation had the power under the Constitution to levy a property tax on the intangible personal property of a corporation created by it, wherever located. *Cream of Wheat Co.* v. *County of Grand Forks,* 253 U. S. 325 (1920). But that case did not involve intangibles that had acquired a commercial domicile in another State.[5] When the Court found that intangibles had acquired a commercial domicile

[5] No question has been raised as to the commercial domicile of the intangibles and the money (except for $1,000) of the Appellant in this case. This property clearly had a commercial domicile in Georgia. The facts determining commercial domicile given by this Court in *Wheeling Steel Corp.* v. *Fox,* 298 U.S. 193 (1936), are the same facts stipulated in this case (R. 39).

in a State other than the State of incorporation, it held that the State of commercial domicile could levy a property tax against such intangibles. *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193 (1936).

Does this mean that a State of incorporation may levy a property tax on intangibles with a commercial domicile in another State? This Court has specifically refused to hold that it may. A review of the relevant cases makes this clear. In *Curry* v. *McCanless*, 307 U. S. 357 (1939), the majority opinion of this Court stated that a State of incorporation could impose a tax on intangibles regardless of their taxation in another State. But that was a 5 to 4 decision and on this specific point Mr. Justice Reed, one of the bare majority, recorded his disagreement. No case decided by this Court has held that a State of incorporation may levy a property tax on all of the corporation's intangibles when they have acquired a commercial domicile in another State. Double taxation is not constitutionally impermissible, but a corporation that is multi-State as is the Appellant presents the problem in a more acute form.

The cases are few and easy to review. In *Newark Fire Insurance Co.* v. *State Board*, 307 U. S. 313 (1939), this Court held as a matter of fact that commercial domicile in another State had not been proven. There was no question of commercial domicile in *Central Hanover Bank & Trust Co.* v. *Kelly*, 319 U.S. 94 (1943), or in *Greenough* v. *Tax Assessors*, 331 U. S. 486 (1947), for each of them involved the domiciles of individuals and not the multi-state problems of corporate operations. The same result obtains as to *State Tax Commission* v. *Aldrich*, 316 U. S. 174 (1942); no question of commercial domicile was involved.

In sum, no case decided by this Court has ever held that a State of incorporation may levy a property tax on all intangibles of its corporation wherever located and regard-

less of a commercial domicile established outside that State. This was the decision of the court below in this case. And its decision is squarely in conflict with that of the Court of Appeals of Kentucky. In *Standard Oil Co.* v. *Kentucky*, 311 S.W. 2d 372 (1958), the Court of Appeals of Kentucky refused to permit Kentucky to levy on a Kentucky corporation a tax on its intangibles that had a situs outside Kentucky. That court made its ruling clear:

> "We have seen no case, and do not expect to see one, which holds that the State of Incorporation can impose a direct ad valorem property tax on the corporate property located outside the State as a condition for permitting a corporation to be organized under its laws." (p. 376)

Yet that is what Virginia has done in this case. And the court below considered and explicitly refused to follow the Kentucky decision. The result is not the classic conflict between the circuits, but a conflict between the highest courts of two States. That is a conflict that this Court must resolve. It is a conflict based entirely on the Constitution of the United States. It deserves serious consideration.

VII.

CONCLUSION

The unfairness that has been accorded the Appellant by Virginia is obvious. But that alone is no reason why this Court should review this case. What makes this case of importance are two principles of law. The court below refused to recognize the basic principle relating to the imposition of retroactive taxes and the basic principle relating to State power to tax intangibles. In its determination as to each of these points, it was not only in error; it failed to recognize basic constitutional limitations.

This Court should review this case to make clear the limitations on State power to tax and, as well, to relieve the Appellant from significant oppression.

Respectfully submitted,

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APPENDIX A

1.

Opinion of the State Corporation Commission of Virginia December 15, 1964

CATTERALL, COMMISSIONER: The applicant seeks a refund of taxes paid on money and intangibles on the ground that the taxes are so unfair as to be unconstitutional. It relies partly on the fact that it is incorporated in two states, Delaware and Virginia. The reason it is incorporated in Virginia is that § 163 of the Constitution of Virginia requires it to be a Virginia corporation in order to do business in Virginia. The reason § 163 imposes that requirement is to make a public service company subject to the jurisdiction of the State for all purposes (including taxation) as a domestic corporation. Applicant complains that the same property is exposed to taxation in three states. Delaware and Georgia have not, so far as the record shows, imposed any tax on this property, but if they did, the circumstance would be immaterial.

The taxes in question were assessed under §§ 58-588, 58-593 and 58-594 of the Code of Virginia. There is no ambiguity in those sections. Applicant seeks to suggest a possible ambiguity by saying at page 21 of its brief:

"The doing of business in Virginia is the basis for the tax classification, and accordingly the tax itself must be related to the Virginia business done. This proposition is further supported by the situation of Kingsport Power Company, a Virginia electric utility corporation operating entirely outside Virginia. This Commonwealth has never attempted to levy a tax on the intangible property of that corporation even though its legal domicile is here."

The doing of business in Virginia is not the basis for the tax classification. The tax classification is:

§ 58-588. "Every corporation * * * authorized by its certificate of incorporation to transmit * * * petroleum * * * by means of a pipeline or pipelines in this State, * * *"

The tax is imposed because the corporation has that power in its charter: nothing turns on whether it ever exercises the power. The tax classification of electric utilities is different. As to them, the tax classification (§ 58-602) is:

"* * * every corporation doing in this State the business of furnishing water or heat, light and power, whether by means of electricity or gas * * *"

Kingsport Power Company has not been assessed because the statute applicable to power companies imposes no tax on it.

The intent of the General Assembly to tax all intangibles owned by pipeline companies is clear. The only question is whether the constitution forbids all or part of the tax. The rule of decision in such cases is that a court will not hold a statute unconstitutional unless it is unconstitutional beyond a reasonable doubt. In support of that proposition, 17 M. J., Statutes, § 29 cites 59 Virginia cases, the most recent being *Perry* v. *Board of Funeral Directors,* 203 Va. 161, in which the court said (p. 165):

"It has long been established that every presumption is to be made in favor of an act of the legislature, and it is not to be declared unconstitutional except where it is clearly and plainly so. Courts uphold acts of the legislature when their constitutionality is debatable, and the burden is upon the assailing party to prove the claimed invalidity."

"If any reasonable doubt exists as to its constitutionality, the act will be upheld."

Appellant's argument does not go to the length of even

claiming that the Virginia statute is unconstitutional beyond a reasonable doubt: at most it attempts to cast doubt on the statute's constitutionality.

There was a time when the Supreme Court of the United States attempted to keep two states from taxing the same intangible property; but it gave up that attempt long ago. The turning point came in *Curry* v. *McCanless,* 307 U. S. 357 (1939).

In *Curry* v. *McCanless,* an Alabama trustee held intangibles in trust. The *cestui que* trust was domiciled in Tennessee and died. Both states sought to collect inheritance taxes. The Supreme Court of Tennessee held that Tennessee *could* and that Alabama could *not* tax the transfer of the intangibles. Its decision was based on its belief that intangibles could be taxed in only one state. Its belief was based on the fact that the United States Supreme Court had recently so held in *First National Bank* v. *Maine,* 284 U. S. 312.

On appeal, five Justices of the Supreme Court purported to distinguish *First National Bank* v. *Maine* and held that both states could tax the securities owned beneficially by a citizen of Tennessee and held in trust by an Alabama trustee. Four of the five Justices were prepared to go further than one of them. Accordingly, they expressed their views in a sweeping dictum that exactly covers the constitutional question we have to decide. Counsel for Colonial Pipeline Company assert that *Curry* v. *McCanless* does not apply to this case because the tax in that case was on the *transfer* of the securities and the tax in the present case is on the *ownership* of the securities. The sweeping dictum covered all taxes and expressly covered taxes on ownership. It begins by citing eight cases holding that the state of "business situs" can tax intangibles used in business there; and then goes on to declare that the same intangibles may also be taxed by the state of the domicile of the owner.

Omitting the citations, the dictum is:

"The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. * * * But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles."

That means that Virginia can tax *all* the intangibles of Colonial Pipeline regardless of the "business situs" of those intangibles, regardless of whether they *can* be taxed in Delaware and Georgia, and regardless of whether they *are* taxed in Delaware and Georgia.

The four Justices who concurred in the sweeping dictum were obviously dissatisfied with the line of cases culminating in *First National Bank* v. *Maine:* Three years later, three of the four dissenting Justices in *Curry* v. *McCanless* were off the bench, and the court overruled the line of cases culminating in *First National Bank* v. *Maine.*

In *State Tax Commission of Utah* v. *Aldrich,* 316 U. S. 174 (1942) the court's holding is stated at page 181 as follows:

"For the reasons stated we do not think that *First Nat. Bank* v. *Maine* should survive. We overrule it. In line with our recent decisions in *Curry* v. *McCanless, Graves* v. *Elliott* and *Graves* v. *Schmidlapp* we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State."

Counsel for the Pipeline Company object (p. 13 of their brief) that Mr. Justice Reed did not concur in the sweeping dictum in *Curry* v. *McCanless* that fits this case like a glove; and that *Curry* v. *McCanless* did not involve *ad valorem*

property taxation. (p. 12 of their brief.) Both objections evaporate in the light of *Greenough* v. *Tax Assessor,* 331 U. S. 486 (1946) which did involve *ad valorem* property taxation and the opinion in which was written by Mr. Justice Reed.

That case involved a statute imposing a tax on securities held in trust by any executor, administrator or trustee. There were two testamentary trustees. The active trustee, the *cestui que* trust and the securities were in New York. The inactive trustee was a resident of Rhode Island. The Rhode Island tax was on "the resident trustee's proportionate part [one half] of these trust intangibles." On the constitutional power of a state to tax intangibles at the domicile of the owner, the court said (p. 492):

"So long as a state chooses to tax the value of intangibles as a part of a taxpayer's wealth, the location of the evidences of ownership is immaterial. If the location of the documents was controlling, their transfer to another jurisdiction would defeat the tax of the domicilary state. As a matter of fact, there is more reason for the domiciliary state of the owner of the intangibles than for any other taxing jurisdiction to collect a property tax on the intangibles. Since the intangibles themselves have no real situs, the domicle of the owner is the nearest approximation, although other taxing jurisdictions may also have power to tax the same intangibles. Normally the intangibles are subject to the immediate control of the owner. This close relationship between the intangibles and the owner furnishes an adequate basis for the tax on the owner by the state of his residence as against any attack for violation of the Fourteenth Amendment."

The dissenting Justices in that case did not dissent from the foregoing statement of the law.

In *Central Hanover Bank* v. *Kelly,* 319 U. S. 94 (1943) an unanimous court agreed with what was said in *Curry* v. *McCanless* about the state of domicile. At page 96 the court said:

"It is much too late to contend that domicle alone is insufficient to give the domiciliary state the constitutional power to tax a transfer of intangibles where the owner, though domiciled within the state, keeps the paper evidences of the intangibles outside its boundaries. See *Blackstone* v. *Miller,* 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277; *Blodgett* v. *Silberman,* 277 U. S. 1, 72 L. ed. 749, 48 S. Ct. 410; *Curry* v. *McCanless,* 370 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, 123 A. L. R. 162, and cases cited. The command of the state over the owner, the obligations which domicile creates, the practical necessity of associating intangibles with the person of the owner at his domicile since they represent only rights which he may enforce against others—these are the foundation for the jurisdiction of the domiciliary state to tax. *Curry* v. *McCanless, supra.*"

The gist of applicant's argument is summed up on page 11 of its brief as follows:

"The Supreme Court has never held that a State of incorporation may levy a direct *ad valorem* property tax on all the intangibles of its domestic corporation regardless of the existence of a commercial domicile in another State, and there is language in the Court's opinions that indicates that such a tax would be unconstitutional."

There is no such language in any of the Court's opinions delivered since 1939, and even if there were such language it would not "indicate" that the Virginia statute is unconstitutional beyond a reasonable doubt. Applicant's argument is not that the failure of the statute to apportion the

tax burden is in plain violation of the constitution. Its argument is that we should declare the statute void because of the possibility that five Justices of the Supreme Court might at this late day be persuaded to disinter the long-buried doctrines of Mr. Justice McReynolds, *Newark Fire Ins. Co.* v. *State Bd. of Tax Appeals,* 307 U. S. 313 (1939) was decided the same day as *Curry* v. *McCanless.* Two of the judges then sitting are still sitting. Justices Black and Douglas concurred with Justice Frankfurter in saying:

"Wise tax policy is one thing; constitutional prohibition quite another." * * * "When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

The argument that a Virginia court should declare void a Virginia taxing statute because twenty-five years ago there was "language in the Court's opinions that indicates that such a tax would be unconstitutional" assumes that the Commonwealth has the burden of proof, assumes that a law is void if its constitutionality is doubtful, and ignores the holding of *Perry* v. *Board of Funeral Directors,* 203 Va. 161, 165:

"Courts uphold acts of the legislature when their constitutionality is debatable, and the burden is upon the assailing party to prove the claimed invalidity."

What has been said demonstrates that Virginia has constitutional authority to tax all the intangibles and all the money of a Virginia corporation. *Commonwealth* v. *Appalachian Electric Power Company,* 193 Va. 37 (1951) did not question the power of the state to tax all the money of domestic corporations. Since 1941, however, the Commission had been prorating the tax on money. When the writer of this opinion became a member of the Commission in 1949

he was convinced that the administrative interpretation was erroneous and gave his reasons at page 38 of the 1951 Annual Report of the State Corporation Commission. The majority adhered to its administrative interpretation. The Attorney General took an appeal, and the Court of Appeals upheld the administrative interpretation, saying (p. 45):

"It is of course true, as the brief of the Attorney General points out, that 'the doctrine of administrative interpretation will not be allowed to change the plain meaning of the statute.' *Superior Steel Corp.* v. *Commonwealth,* 147 Va. 202, 206, 136 S. E. 666. But the disagreement here is as to whether the meaning is so plain and unambiguous as to require no interpretation. We are convinced from a consideration of the majority and dissenting opinions and the briefs of counsel that it is not. Consequently, we apply well-recognized rules for the interpretation and application of such statutes.

"We have frequently said that the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight by the courts and in doubtful cases will be regarded as decisive. The Legislature is presumed to be cognizant of such construction and when long continued, in the absence of legislation evincing a dissent, the courts will adopt that interpretation. See *Smith* v. *Bryan,* 100 Va. 199, 204, 40 S. E. 652, 654; *Hunton* v. *Commonwealth,* 166 Va. 229, 242, 183 S. E. 873, 878; *Commonwealth* v. *Stringfellow,* 173 Va. 284, 289, 4 S. E. (2d) 357, 359; *Miller* v. *Commonwealth,* 180 Va. 36, 42, 21 S. E. (2d) 721, 723.

"Since the ruling of the Commission with respect to this matter became effective in 1941, the General Assembly has met for five regular sessions. Not only has it failed to make any change in the law, as interpreted by the Commis-

sion, but it reenacted the applicable statute into the Code of 1950."

There is one notable difference between the statute involved in the *Appalachian* case and the one involved in the present case. Pipeline companies have to pay the tax even if they never engage in business. The tax is imposed on them not because they do business but because they have the charter powers enumerated in the taxing statute. Electric utilities are not required to pay the tax unless they are doing business. In the *Appalachian* case the court said at page 42:

"The language employed designates the taxpayer as a 'corporation doing in this State the business' of an electric utility."

* * *

"We agree that the language of the statute indicates a relationship between the business done in Virginia and the money which is to be taxed."

There is no such language in the statute now under consideration; and, if what the court said about that language was essential to its decision, that decision does not apply to § 58-588. The court, however, gave such decisive weight to "the doctrine of administrative interpretation" as to make it abundantly clear that if the administrative interpretation had been the other way the case would have gone the other way.

The court's reliance on the doctrine of administrative interpretation in that case applies with equal force in this case. At page 44, the court said:

"The holding of the Commission in the cases now before us is in conformity with its previous administrative practice. According to the stipulation of facts, prior to 1941

the administrative practices in assessing and collecting the State tax on such utilities were not uniform or consistent. Some companies reported and were taxed on the full amount of the moneys held or on deposit, while others excluded the sums derived from operations in other States.

"About 1933, as the majority opinion says, 'a practice began to relate the tax on the money of utility companies to the business from which the money was derived.' But it was not until 1941 that the question came before the Commission for formal determination. At that time, after full consideration of the matter, the Commission reaffirmed the basic principle of the practice which had grown up with its staff, that money derived from and employed in business in another State was not within the intent of the statute.

"This decision was embodied by the Commission in a revised official form of tax return which has continued, until the assessments here under review, to govern the procedure for reporting by all utilities in this State."

The official form referred to by the court *did* permit apportionment of money and did *not* permit apportionment of intangibles. On the subject of apportioning the tax on intangibles the administrative practice has been uniform from the beginning. The Commission has always assessed the tax on all the intangibles owned by the utility and has never apportioned the tax on any basis whatever. The uniform practice of the Commission to levy the tax on all intangibles helps to explain the uniform practice of the utilities to invest in tax-exempt securities.

This brings us to the question of whether the tax is unconstitutional because retroactive. No question of interpretation is involved because the statute applies expressly to property owned on January 1, 1964. The Applicant asks

us to hold unconstitutional an Act of the General Assembly on the basis of vague dicta of lower courts that have never been approved by the United States Supreme Court.

The federal cases relied on by Applicant have one thing in common: they were decided against the taxpayer. *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338 (1922) did not involve a tax: it involved canal tolls extorted without lawful authority. If the case *had* involved a tax the decision would have been against the taxpayer. The court said (p. 339):

"The argument that prevailed below was based on the supposed analogy of *United States* v. *Heinszen,* 206 U. S. 370, * * * which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if, instead of calling it a ratification, Congress had purported to impose the tax for the first time, the enactment would have been within its power. *Phillip Wagner* v. *Leser,* 239 U. S. 207, 216, 217, 60 L. ed. 230, 236, 36 Sup. Ct. Rep. 66; *Stockdale* v. *Atlantic Ins. Co.,* 20 Wall. 323, 22 L. ed. 348."

Since *Cohan* v. *Commissioner,* 39 F. (2d) 540 (C.A. 2, 1930) was decided against the taxpayer it is not an authority in favor of the Applicant. The dictum relied on by Applicant refers generally to the possibility of "extreme cases." Another dictum in the case refers specifically to retroactive statutes increasing the rates of existing taxes or imposing new taxes. At page 545, Judge Hand said:

"Nobody has a vested right in the rate of taxation, which may be retroactively changed at the will of Congress at least for periods of less than twelve months; Congress has done so from the outset. *Brushaber* v. *Union Pac., R. R. Co.,* 240 U. S. 1, 36 S. Ct. 236, 60 L. Ed. 493, L. R. A. 1917D,

414, Ann. Cas. 1917B, 713; *Lynch* v. *Hornby,* 247 U. S. 339, 38 S. Ct. 543, 62 L. Ed. 1149. The same rule applies to excises (*Billings* v. *U. S.* 232 U. S. 261, 34 S. Ct. 421, 58 L. Ed. 596), even when imposed for the first time."

In *Billings* v. *United States,* 232 U. S. 261 (1914), the court, disposing of the claim that a new annual use tax on the American owners of foreign-built yachts was unconstitutionally retroactive, said (p. 282):

"Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. *Flint* v. *Stone Tracy C.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312, and authorities there cited. While the rule is that statutes should be so construed as to prevent them from operating retroactively, that principle is one of construction, and not of reconstruction, and therefore does not authorize a judicial re-enactment by interpretaion of a statute to save it from producing a retroactive effect."

United Business Corporation v. *Commissioner,* 62 F. (2d) 754 (C. A. 2, 1933) is cited by Applicant as "another case in point." It is in point. It was decided against the taxpayer. The holding of the court was: "* * * the power is undoubted to make ordinary taxes retroactive so far." (That is, to the preceding 1st of January.) Judge Hand's dictum referred to but not quoted by counsel for applicant suggested that perhaps there ought to be a *"locus penitentiae"* for "such a tax as this." The tax was not an ordinary tax but an extraordinary 25% surcharge designed to discourage tax avoidance by forming a corporation to accumulate income.

In *Prather* v. *Commissioner,* 322 F. (2d) 931 (C. A. 9,

1963) the retroactive tax was upheld on two grounds. One of the grounds is stated in Appellant's brief. The other ground is stated by the court (p. 938):

"Further, it just can't be accepted as a reason to declare a statute unconstitutional the circumstances that they would not have transferred their business to a corporation had they known about statutory changes to come."

The foregoing statement is not mere dictum. A decision resting on two grounds is authority for both grounds. *United States* v. *Title Ins. Co.*, 265 U. S. 472, 21 C. J. S., Courts § 190b., p. 315, note 90.

The Pipeline Company complains that if it had known the law was to be changed it would have put its money in government securities. Obviously, the Prathers would not have done what they did had they known about statutory changes to come. The burden of the tax on the Prathers was greater than the burden of the tax on this pipeline company. The court described the consequences of the tax to the Prathers, saying it:

"* * * about ruins the Prathers and takes the fruits of a business they built up for over 13 years."

Their 1954 income was $9,000; their 1954 income tax was $160,000.

Wilgard Realty Co. v. *Commissioner*, 127 F. (2d) 514 (C A. 2, 1942) is another case that was decided against the taxpayer. The court's dictum quoted in Applicant's brief is followed by another dictum more nearly applicable to the case at bar. The court said (p. 517):

"Sometimes the extent of permissible retroactivity can be measured with sufficient certainty in terms of time. As for instance, the 'recent transactions' as to which a retroactive tax law might be valid under *Cooper* v. *United*

States, 280 U. S. 409, 411, 50 S. Ct. 164, 74 L. Ed. 516, were in *Welch* v. *Henry, supra*, at page 150 of 305 U. S., at page 127 of 59 S. Ct., 83 L. Ed. 87, 118 A. L. R. 1142, 'taken to include the receipt of income during the year of the legislative session preceding that of its enactment.' Taxpayers must expect that fundamental changes in tax laws may be made at any time in a taxable period to be effective for the entire period and in addition for some time previously, as the above cases show. That is to say, retroactivity in taxation which would otherwise be so arbitrary as to be unconstitutional may escape such disability if it is not too great in point of time."

The meaning of this dictum is that no matter how extreme the case may be and no matter how disappointed the taxpayer is, a tax retroactive to the preceding first day of January can never be unconstitutional.

In *Welch* v. *Henry*, 305 U. S. 134 (1938) the taxpayer invested the bulk of his fortune in tax-exempt securities. He did what the Applicant wishes it had done. His 1933 gross income of $13,000 included $12,000 in dividends paid by Wisconsin corporations which were tax-exempt under Wisconsin law. In 1935 Wisconsin passed a statute taxing the 1933 dividends. The court said (pp. 146, 147):

"The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive."

* * *

"In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the

time of the particular voluntary act which the statute later made the taxable event."

* * *

"In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

"Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases. See *Phillip Wagner* v. *Baltimore*, 239 U. S. 207, 60 L. ed. 230, 36 S. Ct. 66; *Seattle* v. *Kelleher*, 195 U. S. 351, 49 L. ed. 232, 25 S. Ct. 44; compare *Citizens' Nat. Bank* v. *Kentucky*, 217 U. S. 443, 454, 54 L. ed. 832, 836, 30 S. Ct. 532; *Billings* v. *United States*, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 S. Ct. 421."

The present case is not distinguishable from *Welch* v. *Henry*, and the refund applied for cannot be allowed.

HOOKER, *Chairman*, and DILLON, *Commissioner*, concur.

2.

Order of the State Corporation Commission of Virginia of December 15, 1964

THE APPLICATION herein was heard on November 4, 1964 and continued to December 14, 1964 for the purpose of oral argument upon briefs filed by the parties in interest. The applicant was represented by John W. Riely and H. Brice Graves, its counsel, the Commonwealth by D. Gardiner Tyler, Assistant Attorney General, and the Commission by its counsel.

NOW ON THIS DAY the Commission having considered the evidence herein, the briefs and argument of coun-

sel is of the opinion for reasons set forth in an opinion of this date by Commissioner Catterall and filed herein, that the application herein should be denied.

IT IS THEREFORE ORDERED that the application of Colonial Pipeline Company for review and correction of the taxes assessed against it on money held and intangible personal property owned by it for the year beginning January 1, 1964 be denied and this proceeding be dismissed and dropped from the docket.

AN ATTESTED copy hereof and of the opinion referred to herein shall be sent to John W. Riely, Electric Building, D. Gardiner Tyler, Assistant Attorney General, and to the Director of Public Service Taxation of the Commission.

3.

Opinion of the Supreme Court of Appeals of Virginia
November 29, 1965

EGGLESTON, CHIEF JUSTICE: This is an appeal of right from an order of the State Corporation Commission denying the application of Colonial Pipeline Company for refund of taxes assessed on intangible personal property and money owned by it as of January 1, 1964. The assessment was made by the Commission on May 12 of that year and the taxes were paid under protest. Refund was sought on the grounds that the amendment to Code (Repl. Vol. 1959), 1964 Cum. Supp., § 58-588, effective on March 10, 1964, which authorized the assessment of these taxes on property owned by Colonial as of January 1 of that year, was retroactive in its application and in contravention of the Constitution of Virginia and the Constitution of the United States; that on January 1, 1964, as of which date these taxes were assessed, the commercial domicile

of Colonial and its property sought to be taxed was in the State of Georgia and not in the State of Virginia, and that the latter lacked the constitutional authority to impose a tax on its property. Moreover, Colonial contended that since the commercial domicile of its property was outside the State, Virginia may not tax a greater portion of intangible property and money than is justified by the ratio of Virginia business or investment to the total of its business or investment.

The case was heard by the Commission on an agreed stipulation of facts and oral testimony. Based on a written opinion by Commissioner Catterall and concurred in by his associates, the Commission entered an order validating the assessment and denying the refund. Hence this appeal.

Colonial is a public service corporation chartered and organized under the laws of the State of Delaware for the purpose of constructing a petroleum products pipeline to transport various grades of gasoline, kerosene, heating oils and similar products from the producing and refining area of the Gulf Coast northeastwardly to the eastern seaboard. This line crosses Virginia.

Since Colonial is a public service corporation, it must be a Virginia corporation in order to exercise the power of eminent domain or to carry on the functions of a public service corporation in this State. (Constitution of Virginia, § 163.) To comply with this constitutional requirement, Colonial formed a wholly-owned Virginia subsidiary which was merged into the parent company. The result of that merger was to convert Colonial into a Virginia corporation as well as a Delaware corporation. After the merger and prior to January 1, 1964, Colonial has exercised the power of eminent domain in Virginia and in other States.

As of January 1, 1964 Colonial maintained a statutory office in Wilmington, Delaware, and a registered office in

Richmond, Virginia. As of that date, and thereafter, it maintained its general business office at 3390 Peachtree Road, N. E., Atlanta, Georgia. The general books and accounting records were kept at that office. The president, executive vice-president, vice-president and general counsel, secretary, treasurer and other officers all resided in Atlanta. The affairs and business of Colonial were managed and directed from the Atlanta office; all bills for its pipeline services were prepared and mailed from that office, and all collections were made there.

Chapter 217 of the Acts of Assembly of 1964 amended Code, § 58-588, so as to subject to taxation in Virginia pipeline companies having the power of eminent domain in this State and "authorized * * * to transmit * * * crude petroleum and the products or by-products thereof * * * in this State."[1] The Act of amending the statute, which was an emergency act and in force from its passage, was approved by the Governor on March 10, 1964. It was specifically made applicable to the tax year beginning on January 1, 1964, and to each year thereafter.

On January 1, 1964 Colonial's pipeline in Virginia was under construction. As of that date it had money on deposit in banks located in Georgia and in New York. This money was derived from loans made to Colonial by New York banks and the funds were used for the construction of its pipelines. It also owned other intangible property, consisting of United States Treasury bills and short-term notes of certain financial institutions. These investments were made by telephone from Colonial's Atlanta office to banks or investment banking houses in New York.

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[1] Prior to the amendment the statute was applicable to "Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit *natural gas* in the public service by means of a pipe line or pipe lines in this State." (Italics supplied.)

In assessing Colonial's intangible property for taxation as of January 1, 1964, the Commission deducted the amount of the United States Treasury bills which were not taxable, and assessed a tax of $123,450.26 on the balance of its short-term investments. According to the stipulation, "The tax on money was arrived at by reducing the total amount of money on hand and on deposit at January 1, 1964, of $22,486,400.82 by amounts allocated to Georgia and New York on the basis of the ratio of investments in property, plant and equipment in those States to total investments of Colonial, leaving $19,489,267.80 taxable at the rate of 20 cents per $100, producing a tax of $38,978.54."

Certain officials of Colonial testified that had they known that legislation would be enacted by the State of Virginia at its 1964 session of the General Assembly authorizing the imposition of these taxes as of January 1, 1964, Colonial would have, before that date, converted its excess intangible personal property and money into nontaxable United States Government bonds.

The first contention of Colonial is that the provision in the Act amending Code, § 58-588, making it applicable to the tax year beginning January 1, 1964, is retroactive tax legislation which has frequently been condemned by the courts as unconstitutional and void. The argument is that since the Act amending the statute became effective on March 10, 1964, this taxpayer did not know or have reason to believe before January 1, 1964, that such a tax would be levied; that had it known or had reason to believe before this date that the tax would be levied, it had at hand means of avoiding it which presumably it would have used. Consequently, it says, the "retroactive application" of such "unanticipated taxes" for the year 1964 is "unfair, unreasonable and unjust," and such taxes are unconstitutional and void.

We do not agree with this contention. In the first place, it is debatable, to say the least, whether a statute enacted during the taxable year authorizing the assessment of a tax on property held by a taxpayer as of January first of that year should be classified as "retroactive tax legislation" which has sometimes been condemned by the courts. Under our Constitution (§ 46) the General Assembly meets in regular session once in two years on the second Wednesday in January. During such sessions it frequently revises the tax structure of the State and makes such revisions effective as of the first day of that year. In so doing, it fixes the base for the effective date of such taxes at that date.

But assuming that this provision amending § 58-588, making it applicable to the tax year beginning January 1, 1964, may properly be classified as "retroactive legislation," it does not follow that it is violative of either the State or Federal Constitutions. It is well settled that the mere retroactivity of a statute affecting taxation does not render it unconstitutional. Such a statute is valid if it is not arbitrary and does not disturb vested rights, impair contractual obligations, or violate due process. 16A C. J. S., Constitutional Law, § 419, p. 116 *ff.*; 51 Am. Jur., Taxation, § 109, p. 143; *Id.*, § 122, p. 161; *Id.*, § 661, pp. 623, 624; *Welch* v. *Henry,* 305 U. S. 134, 146, 59 S. Ct. 121, 125, 83 L. ed. 87.

In the present case no question of disturbing vested rights is involved. No one has the vested right to be free of taxation, nor does he have the constitutional right to know that a tax will be levied in such a manner that he may avoid it.

In the gift tax cases upon which Colonial relies (*Nichols* v. *Coolidge,* 274 U. S. 531, 47 S. Ct. 710, 71 L. ed. 1184, 52 A. L. R. 1081; *Blodgett* v. *Holden,* 275 U. S. 142,

48 S. Ct. 105, 72 L. ed. 206, and *Untermeyer* v. *Anderson*, 276 U. S. 440, 48 S. Ct. 353, 72 L. ed. 645), the Supreme Court held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute. This was so because the effect of the enactment was to disturb such vested rights. But, as was pointed out in *Welch* v. *Henry, supra,* "Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfuly urged in the gift cases." 305 U. S. at 147, 59 S. Ct. at 126.

It is true, as Colonial says, that the *Welch* case involved the constitutionality of a retroactive *income* tax, but we think the principles there enunciated apply with equal force to the present case involving ad valorem property taxes.

In *Department of Industrial Relations* v. *West Boylston Mfg. Co.*, 253 Ala. 67, 42 So. 2d 787, it was held that a taxable event may be one which has occurred before the law levying the tax was enacted. Thus, a statute levying excise taxes for the current year may be made applicable to transactions for the entire year. See also, *Roth Drugs* v. *Johnson*, 13 Cal. App. 2d 720, 57 p. 2d 1022.

In *Merchants Nat. Bank of Boston* v. *Merchants Nat. Bank of Boston*, 318 Mass. 563, 62 N. E. 2d 831, it was held that property subject to taxation may be taxed as of a date prior to the passage of the statute, provided such retroactive operation does not extend back for more than a reasonable period.

In the case before us the retroactive operation of the statute was within the current year and within three months of the date on which the statute became effective. Surely, such retroactive operation did not extend for more than a reasonable period, nor was it "so harsh and oppressive as to

transgress the constitutional limitation." *Welch* v. *Henry, supra,* 305 U. S. at 147, 59 S. Ct. at 126.

In its brief Colonial admits that the retroactive application of a tax is valid if "the taxpayer had on the tax day a reasonable expectation that the tax would be imposed on the transaction or condition in question." We think the record here shows that prior to January 1, 1964 Colonial had a reasonable expectation that the tax would be imposed. In 1963, in the case of *Commonwealth ex rel. White* v. *Colonial Pipeline Co.,* 1963 S. C. C. Rep. 83, one of the questions involved was whether Code, § 58-588, as then written and prior to the amendment, applied to Colonial. In an opinion handed down on October 24, 1963, the Commission held that it did not. The effect of this holding was to exempt Colonial from taxation under the statute as it then stood. Colonial should have known that at the next session of the General Assembly, which was then approaching, the statute would be so amended as to subject it to a tax. Indeed, such was the obvious purpose of the amendment.

We hold that the provision in the statute, as amended, making it applicable to the tax year beginning on January 1, 1964, is not violative of any provision of either the State or Federal Constitutions.

Colonial's next contention is that as of January 1, 1964, the date on which its property was assessed for taxes under § 58-588, as amended, its commercial domicile was in the State of Georgia; that the taxable situs of its intangible property and money was there, and that the State of Virginia is prohibited by the Constitution of the United States from levying a tax on such property.

In its brief Colonial premises its argument thus: "The Supreme Court of the United States has never held that a State of incorporation has the constitutional authority to

impose a direct property tax on all the intangible property, wherever located, of a corporation when the property in question has acquired a situs at a commercial domicile outside the State."

There are ready answers to this premise. In the first place, the power of the State of Virginia to levy taxes is not derived from the Constitution of the United States as interpreted by the Supreme Court. On the contrary, the State has the inherent and unlimited power of taxation unless restrained by its Constitution or the Constitution of the United States. 18 Mich. Jur., Taxation, § 3, pp. 125, 126, and cases there collected. Moreover, there is a presumption of the constitutionality of a statute and the burden is upon the assailing party to prove its invalidity. 16 Am. Jur. 2d, Constitutional Law, § 137, p. 336 *ff.*; *Id.*, § 172, p. 390 *ff.*, 16 C. J. S., Constitutional Law, § 99, p. 388.

We are pointed to no decision of the Supreme Court, nor have we found any, which expressly holds that the State of incorporation may not levy an ad valorem tax on the intangible property and money of a corporation which has its commercial domicile in another State.

The nearest precedent for the position of Colonial is *Standard Oil Co.* v. *Commonwealth*, 311 S. W. 2d 372, decided by the highest court of Kentucky in 1958. Standard Oil Company, a Kentucky corporation with its home office in Louisville, was engaged in the business of marketing petroleum products in Kentucky, Georgia, Alabama, Mississippi and Florida. Products were shipped directly to the States in which they were to be sold. Separate books of accounts receivable and notes were entered and listed in each State and collections were deposited in local banks. No one at the home office had the authority to draw checks on the accounts in the other States. The taxing authorities of Kentucky admitted that a part of the accounts receivable

and notes had a commercial, legal and taxable situs in States other than Kentucky. Kentucky undertook to levy a tax upon the accounts receivable and notes derived from the business operated in the other States and from the bank deposits derived from such accounts receivable and notes. The Supreme Court of Kentucky held that the State did not have the constitutional authority to impose an ad valorem tax on this intangible property which had a business situs elsewhere, because those intangibles received no benefit or protection from Kentucky.

This decision was based largely on *Wheeling Steel Corporation* v. *Fox,* 298 U. S. 193, 56 S. Ct. 773, 80 L. ed. 1143. This latter case held that where intangibles had acquired a commercial domicile in West Virginia they could be taxed by that State even though the owner was incorporated under the laws of Delaware. However, it did not hold that Delaware, the State of incorporation, lacked the power and authority to tax the same property.

In the present case there is no showing that Colonial's intangibles and money were produced from business carried on in Georgia. The funds are merely kept there for Colonial's convenience.

Moreover, contrary to the facts in the Kentucky case, Colonial derives a substantial benefit from the laws of the State of Virginia. It claims the power of eminent domain under the laws of this State and has exercised it.[2] The landowners of Virginia have the right to look to such intangible property for redress where their lands have been taken by Colonial. Colonial, on the other hand, needs and has the protection of the laws of Virginia in defending such actions.

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[2] See *Peck Iron & Metal Co.* v. *Colonial Pipeline Co.,* Record No. 5937, and *Ferguson* v. *Colonial Pipeline Co.,* Record No. 6089, now pending in this court.

For these and other reasons to be stated, we are not inclined to follow the decision in *Standard Oil Co.* v. *Commonwealth, supra,* as a precedent in the case now before us.

It will be observed that in the present case no question of double taxation is involved. There is no showing that the State of Georgia, as the alleged domicile of Colonial, has levied any tax on Colonial's intangible property and money on which Virginia has made its assessment. But the fact that this property may be subject to taxation in Georgia does not *per se* preclude the State of Virginia from subjecting it to taxation.

In *Curry* v. *McCanless,* 307 U. S. 357, 59 S. Ct. 900, 83 L. ed. 1339, 123 A. L. R. 162, an Alabama trustee held intangibles in trust. The beneficiary was domiciled in Tennessee and died. Both States sought to collect inheritance taxes. It was held that both could collect. In a dictum by four of the justices who concurred in the result, this was said:

> "* * * The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. * * * But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles. *Cream of Wheat Co.* v. *County of Grand Forks, supra,* 253 U. S. 329, 40 S. Ct. 559, 64 L. Ed. 931; see *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 38 S. Ct. 40, 62 L. Ed. 145, L. R. A. 1918C, 124." 307 U. S. at 368, 59 S. Ct. at 906.

The principle here stated was later approved in *State Tax Commission of Utah* v. *Aldrich,* 316 U. S. 174, 62 S. Ct. 1008, 86 L. ed. 1358, where it was said that in line

with that decision and others, "we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State." 316 U. S. at 181, 62 S. Ct. at 1012. See also, *Newark Fire Ins. Co.* v. *State Board of Tax Appeals*, 307 U. S. 313, 59 S. Ct. 918, 83 L. ed. 1312.

In *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325, 328, 329, 40 S. Ct. 558, 64 L. ed. 931, it was held that a State of incorporation might tax intangibles of its corporation although the physical property and business of the corporation are entirely in another State.

On the whole, we are of opinion that there is no prohibition in the Constitution of the United States against the levy by the State of Virginia of the taxes here in question on all of the intangibles and all of the money of Colonial, although that corporation may have a commercial domicile in the State of Georgia.

The final contention of Colonial is that since its money and intangibles have a commercial domicile outside of Virginia, the base of the property tax should be limited to a ratio of the Virginia business or investment to the total value of such business or investment.

This contention is based on the premise that doing business in Virginia is the basis of the tax classification here. This is not true. The classification clearly expressed in § 58-588, as amended, is: "Every corporation * * * *authorized* by its certificate of incorporation *to transmit* * * * crude petroleum and the products or by-products thereof * * * by means of a pipeline or pipelines in this State, * * * ." (Italics supplied.) The tax is imposed because the corporation has that power in it charter. Whether it exercises that power and does business in this State is not material to the classification.

Moreover, the statutes (Code, §§ 58-588, 58-590, 58-593, 58-594), providing for the assessment, rate of tax-

ation, etc., on this class of corporations, contain no provision for the apportionment of the tax in the manner urged by Colonial.

Commonwealth v. *Appalachian Electric Power Co.*, 193 Va. 37, 68 S. E. 2d 122, cited by Colonial, involved the validity of taxes assessed pursuant to Code, §58-602, on money owned by a corporation "doing in this State the business of furnishing * * * electricity." We upheld the administrative interpretation placed upon that statute by the Commission permitting the apportionment of the tax on money. We did so because, as we there said, "the language of the statute indicates a relationship between the business done in Virginia and the money which is to be taxed. 193 Va. at 42, 68 S. E. 2d at 125. There is no such language in the statute now under consideration (§ 58-588, as amended) with respect to the tax on pipeline companies.

The order of the Commission appealed from is

Affirmed.

4.

Order of the Supreme Court of Appeals of Virginia
November 29, 1964

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore adjudged, ordered and decreed that the said order be, and the same is hereby, affirmed.

Which is ordered to be certified to the said Corporation Commission.

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October Term, 1965

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No. 985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

RESPONSE TO PETITION FOR AN APPEAL AND MOTION TO DISMISS

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Supreme Court of the United States

October Term, 1965

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COLONIAL PIPELINE COMPANY,
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Appellee.

RESPONSE TO PETITION FOR AN APPEAL AND MOTION TO DISMISS

OPINIONS BELOW

The opinion of the State Corporation Commission of Virginia is reported at 1964 S.C.C. Rep. 95. The opinion of the Supreme Court of Appeals of Virginia is reported at 206 Va. 517, 145 S.E. 2d 227. Both of said opinions are found in the Appendix to Statement as to Jurisdiction filed by the appellant with this Court.

PRELIMINARY STATEMENT

The Colonial Pipeline Company, hereinafter referred to as appellant, was assessed by the State Corporation Commission, hereinafter referred to as Commission, with taxes on money and intangible personal property pursuant to Article 9, Chapter 12, Title 58, Code of Virginia (1950)

as amended. Appellant paid the tax and thereafter proceeded to file a claim for refund under the provisions of Section 58-1122, Code of Virginia. The application for refund was heard by the said Commission, which, under the provisions of the Virginia Constitution and under the statutes, is a judicial body. The Commission denied the application for refund. The comprehensive opinion issued by the Commission is found on pages 24 to 35 of Record No. 6051 (red pamphlet). Under the Virginia procedure an appeal is granted as a matter of right from a judgment entered by the Commission to the Supreme Court of Appeals. Upon the appeal, the Supreme Court of Appeals affirmed the order of the Commission denying the refund.

Appellant now seeks an appeal to this Court contending that the act under which the tax is imposed is a violation of the Constitution of the United States. It is stated in the Statement as to Jurisdiction filed by the appellant (hereinafter sometimes referred to as Brief or Petition for an Appeal) the jurisdiction of this Court is invoked under 28 U.S.C., Sections 1257(2) and 2101(c). The mere fact that the appellant has been consistent in its position that the statute (Chapter 217, Acts of the General Assembly of Virginia (1964)) so far as it amended Section 58-588, is unconstitutional, does not bring the constitutionality of the same into substantial question. There is nothing new about appellant's position. The issues it attempts to assert here have already been resolved against appellant's position as a result of principles laid down by this Court in the decided cases.

THE STATUTES INVOLVED

Chapter 12, Title 58, Code of Virginia (1950) deals with the taxation of public service corporations. There are

seventeen articles of this chapter. Article 9, entitled "Pipeline Transmission Companies" contains the sections of the Code which imposed the tax complained of in this proceeding on the appellant (Colonial Pipeline Company), they being Sections 58-588, 58-593 and 58-594. Said Article 9 was amended extensively by Chapter 217, Acts of the General Assembly of Virginia of 1964. A copy of that chapter is found in the Appendix to this response.

The pertinent sections of said article are as follows:

Chapter 12, Title 58, Code of Virginia
Public Service Corporations

* * *

Article 9.

Pipe Line Transmission Companies

§ 58-588. REPORT REQUIRED.—Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit natural gas *or crude petroleum and the products or by-products thereof* in the public service by means of a pipeline or pipelines in this State, which pays no State franchise tax on its gross receipts on account of the transmission of such natural gas or crude petroleum and the products or by-products thereof shall report annually on or before the fifteenth day of April to the State Corporation Commission all of its real and personal property of every description, tangible and intangible, as of the beginning of the first day of January preceding, showing particularly in what city, town or county and school district therein the property is located. This report shall be itemized as provided for herein. Each such corporation shall also report the total miles of mains located in this State.

The report herein required shall be verified by the oath of the president or other proper officer or person making the same.

This section as amended shall apply to the tax year beginning on January first, nineteen hundred and sixty-four and to each tax year thereafter. (Italicized words were added by the amendment in 1964)

§ 58-590. ASSESSMENT BY STATE CORPORATION COMMISSION.—The State Corporation Commission shall, after thirty days' notice previously given the president or other proper person, assess the value of the property of each such corporation and shall assess the franchise tax hereinafter provided for.

Should any such corporation fail to make the reports required by this article on or before the fifteenth day of April of each year, the State Corporation Commission shall, at such time as it may elect, upon the best and most reliable information that can be procured, assess the value of the property of such corporation and may, in the execution of such duty, send for persons and papers.

The State Corporation Commission shall assess upon such property the State taxes, if any, imposed thereon by law.

A certified copy of the assessment of State taxes when made shall be immediately forwarded by the clerk of the State Corporation Commission to the Comptroller and to the president or other proper officer of each such corporation.

§ 58-593. RATE OF STATE TAX ON INTANGIBLES.—The State tax on the intangible personal property (other than shares of stock and bonds issued by counties, cities and towns or other political subdivisions of this State), owned by every corporation falling under the provisions of this

article, shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof.

§ 58-594. RATE OF STATE TAX ON MONEY.—The State tax on the money of every corporation coming under the provisions of this article shall be twenty cents on every one hundred dollars of the assessed value thereof.

STATEMENT OF THE CASE

Appellant seeks to solicit the sympathy of the Court by bemoaning the fact that it paid for 1964 a tax on its intangibles greater than all the other utilities of Virginia except railroads. However, the real reason for this situation is that appellant is a huge corporation and for its own convenience saw fit and did invest its tremendous holdings in intangible property in non-exempt tax securities. Appellant artfully compares its tax liability to those public utilities which are not comparable to it and has deliberately omitted the tax paid by railroads in such a comparison. Appellant is chartered as a common carrier of crude petroleum and the products or by-products thereof. Its pipeline passes through the entire State and extends to other portions thereof. In size and undertaking it is comparable to a large railroad system. If the tax paid by railroads are included along with other public utilities, appellant paid less taxes in 1964 on its intangible property and money than did all the other utilities. Certain figures, showing the extent of appellant's holdings and tax liability are compared with the holdings and taxes paid by all other utility companies in Virginia, were placed in evidence. This evidence was ruled out by the Commission as irrelevant (R. 12). To counter this evidence, the Commonwealth introduced Exhibits 6, 7, 8 and 9, which included figures relative to rail-

roads. For illustration, taking the figures for the year 1964 (Exhibit 6) we have:

	Assessed value of tangible property	*Taxes on intangible property*	*Tax on Money*
All Utilities	$884,586,924	$134,637	$68,438
Colonial Pipe Line	$ 10,298,959	$123,450	$38,979

As stated in the petition for an appeal, appellant was first incorporated in Delaware in 1961, and it was converted into a Virginia corporation in October, 1962, by the merger of the Colonial Pipeline Company of Virginia. As it was a public service corporation, it was necessary for it to be domesticated in Virginia; that is, become a Virginia corporation before it could perform its function as a public service corporation and exercise the right of eminent domain. After October, 1962, appellant exercised the right of eminent domain in Virginia, acquiring extensive holdings represented by rights-of-way in real estate during 1962 and 1963. According to the assessment of the State Corporation Commission based on the report made by appellant under Section 58-588 of the Code, it had tangible property in Virginia having a value of more than $25,000,000.00.* The source of the money and funds used to purchase the commercial paper (intangible property) involved in this case was loans from institutional investors to raise funds to pay for the construction of the pipeline by the appellant. During 1962, 1963 and 1964, appellant was in the process of constructing its lines and not engaged to

* In determining the assessed value, the State Corporation Commission computes 40% of the value of the physical property of the taxpayer.

any extent in transporting by-products of petroleum. It should be borne in mind that none of this money was derived from operations of the appellant in any specific locality. As a Virginia corporation, appellant became liable for taxes and for other responsibilities imposed by the laws of Virginia. In exercising the right of eminent domain in Virginia, all appellant's assets were subject to claims of the property owners from which it took property, and such claims could be enforced by the Virginia courts from said assets.

Appellant, on page 6 of the Statement As To Jurisdiction, in effect states that the amendment to Section 58-588 came as a shock and a great surprise, and that it understood it would be taxed in the same way as corporations that were not public service corporations. We are therefore constrained to make the following observation:

Appellant, during 1962 and 1963, commenced its vast program to acquire property (rights-of-way) on which to construct a pipeline through the State of Virginia, including the spur lines. The system embraced some five hundred miles. The real property (rights-of-way) was acquired by purchase and eminent domain. As we have already stated, the value of appellant's tangible property in Virginia as of January 1, 1964, amounted to some twenty-five million dollars. This property was located in many of the counties throughout the State. Physical (tangible) property of all persons and corporations other than public service corporations is assessed by local officials of the counties or cities wherein such property is located. The physical or tangible property, including real estate, of public utility corporations is assessed by the State Corporation Commission. During the fall of 1963 the question arose as to

how to tax this physical property of the appellant. To have been included in the ambit of said article 9, Title 58, in the long run would be an advantage to the appellant because thereunder the tangible (real and personal) property is assessed by the State Corporation Commission rather than the local authorities (Section 58-590) and depreciation of the cost is allowed, whereas local assessments are on the ascending scale. Likewise, it would have been an advantage to the Commonwealth to have the assessments made by the State Corporation Commission as this would simplify and systemize the taxing procedures. As early as August, 1963, appellant's authority to exercise the power of eminent domain by certain land owners was challenged by certain land owners and litigation ensued. *Ferguson, et al.* v. *Colonial Pipeline Company,* 206 Va. 719, 146 S.E. (2d) 173, and *Peck Iron Company* v. *Pipeline Company,* 206 Va. 711, 146 S.E. 2d 169. In both the *Peck* case, *supra,* and in the case of *Ferguson, et al, supra* (both of these cases were instituted in 1963) appellant asserted in its petitions for condemnation:

> "1. It is a Virginia public service corporation whose business is the transportation of petroleum products and/or any liquids or gases by pipelines as a common carrier for the public. . . ."

See, page 2 of Record 5937, *Peck* case, *supra,* and page 2 of Record 6089, *Ferguson* case, *supra.*

Months after the filing of its petitions in the trial courts, on appellant's motion the courts permitted amendments to other paragraphs in the petitions, deleting the words "and any other liquids or gases." By alleging that it was a Virginia public service corporation whose business it was to

transport as a common carrier "gases by pipeline," appellant certainly must have felt, in 1963, that it was a pipe line transmission company and a public utility and it was included in said Article 9, Chapter 12. Now public service corporations are taxed under Chapter 12, Title 58. The only article of that chapter that appellant could fall under would certainly be Article 9 (§ 58-588 to 601, inclusive). It is inconceivable that appellant, who was and is represented by one of the most outstanding law firms in Virginia, was not fully advised in 1963 of its tax status of the possibility that it was covered by an appropriate amendment to the statute in 1964. This probability certainly enhanced when the Commission expressed in its opinion in the case of *Commonwealth ex rel White and others* v. *Colonial Pipeline Company,** Case No. 16552, October 24, 1963, that Section 58-588 did not cover appellant.

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* The case of Commonwealth of Virginia at the relation of *Mary V. White, et al.,* Case No. 16552, 61 Report of the State Corporation Commission of Virginia, page 82, was a proceeding instituted by various landowners who sought a declaratory judgment that appellant does not possess the power of eminent domain and an injunction forbidding it to assert that power. The Commission dismissed the cases for the lack of jurisdiction. However, in its opinion the Commission stated: "The Code nowhere contains a definition of a pipeline company. It confers on the Commission authority to regulate and tax natural gas pipeline companies, but confers on it no authority to regulate or tax petroleum pipeline companies." This opinion was issued on October 24, 1963. It put at rest the question of whether or not the provisions of Article 9, Title 58, were applicable to appellant. It was notice to the taxing authorities and to the appellant that under the existing statute (58-588 of the Code) the appellant (a petroleum pipeline company) was not covered. Inasmuch as the transmission of petroleum and petroleum products by pipelines in all particulars and character was the same as the transmission of natural gas by pipelines, it was obvious that the public service corporations which transmitted petroleum and petroleum products as common carriers should be taxed in the same manner as the public service corporations which transmit natural gas as common carriers. The convening of a special session of the General Assembly was eminent. However, as the session (November-

Of course, no one could have stated definitely in 1963 what the Virginia General Assembly would do in 1964. Appellant's argument is to the effect that if it had known that the tax would be imposed on its money and intangibles, it would have converted the same into tax exempt securities such as United States bonds, etc. With its eyes wide open the appellant was in a position to know in all probability that there would be amendments to the tax statutes offered in the 1964 General Assembly which would affect the tax status of appellant and the statutes most likely to be amended would be those sections of Article 9, Chapter 12, Title 58, of the Code, *namely, Sections 58-588 et seq. To* be included in the coverage of Article 9 would be an advantage to the appellant as it could bolster its contention that it is a public utility and therefore has the right of eminent domain. Also to be included in the coverage of said Article 9 (58-588 *et seq.*) would mean that the State Corporation Commission would make the assessment of appellant's properties and would obviate the necessity of appellant dealing with many different local officials.

Obviously, one of the purposes of amending portions of Article 9, namely (§ 58-588) was to make it possible to tax the physical properties of appellant in the same way which such property of other public utilities (pipeline transmission companies) was taxed. It was necessary to

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December, 1963) was limited to consider the question of reapportionment, it was not feasible to enact general legislation at that session. However, the regular session was going to convene in January, 1964. It was obvious to anyone close to the situation that in all probability there would be an attempt to amend the provisions of Article 9 of Chapter 12, Title 58, of the Code so as to affect the appellant. It is interesting to note that appellant employed Ralph H. Ferrall (of counsel for appellant) as a lobbyist for the 1964 session of the General Assembly. This is shown by the records of the Secretary of the Commonwealth, of which this Court as well as the Supreme Court of Appeals can take judicial knowledge.

make the amended statute effective January 1, 1964, in order to cover the taxes for the current year (that is, the year in which the statute was amended, 1964).

QUESTIONS PRESENTED

1. Is a State statute in violation of the Constitution of the United States which imposes a tax for the current year based on the taxpayer's property held January first of the year in which the statute was enacted?

2. Is the State of incorporation prohibited by the Constitution of the United States from taxing the intangible property of a corporation where the evidence of such intangible property is held in other States and where the money with which the intangibles were purchased was not derived through the operation of the business of such corporation but by the negotiation of loans and where there is no showing that such intangible property is taxed or could be taxed by the States wherein it is held?

ARGUMENT

I.

Application of the Statute to Appellant So As to Require It to Pay Taxes on Its Intangible Property Held By It on January 1, 1964, is Valid

Appellant argues that an unexpected retroactive tax that would have been avoided is unconstitutional. Brief pages 8-10 inclusive.

The tax here imposed was a tax for the current year. The General Assembly of Virginia always meets after January first. Nevertheless, it revises the tax structure of Virginia so as to relate back to that date. If appellant's argument were sound, then the General Assembly could

never revise taxes for any period prior to the date it passes a tax statute. This just is not so and is contrary to what actually happens both on the State and Federal level.

The appellant argues that the taxes imposed by this statute are unfair, oppressive and discriminatory and deprive the appellant of its property without due process of law in contravention of the Constitution of the United States. It bases this argument on the ground that the appellant had no reason to believe that before January 1, 1964, these taxes would be imposed, and had it had such a reason, it could have avoided or minimized the incidence of these taxes. If such an argument is sound, then no tax statute having retroactive effect would ever be valid, because any person could always claim that he could minimize the incidence of the tax by taking the proper steps, had he known that the tax was going to be imposed.

Whether a statute enacted during the taxable year, levying a tax on wealth held by the taxpayer on January first of that year could be classified as retroactive legislation is debatable. If this legislation is considered retroactive as that term is used in the Federal and State Constitutions, then the issue presented is: Whether a State may enact a tax statute directing that it shall take effect on a date prior to its enactment. Unless this type of legislation is expressly condemned by the United States Constitution, the same is valid. What then is the portion of the Constitution of the United States condemning retroactive legislation?

The Federal Constitution contains this provision: Article I Section 10:

> "No State . . . shall . . . pass any bill of attainer, *ex post facto law,* or *law impairing the obligation of contracts,* or grant any title of nobility." (Italics supplied.)

The pertinent part of the Fourteenth Amendment is:

> "nor shall any state deprive any person of life, liberty or *property*, without due process of law." (Italics supplied)

There must be a vested right in property which is diverted by the operation of the retroactive statute before it can be condemned as being in violation of the Constitution. A person has no vested right not to pay taxes. A person has no vested interest in a tax assessment. The only type of retroactive tax statute which has been condemned is that involving the so-called "gift tax" cases* where the statutes have been applied to transactions (gifts) which have been consummated and the property vested thereby years and years before the legislation was enacted and a hardship has or may result from such application.

Perhaps one of the leading cases on the subject is that of *Welsh* v. *Henry*, 305 U.S. 134, 83 L. Ed. 87 (1938). In that case, the validity of a Wisconsin statute enacted in 1935 imposing a tax on corporate dividends received by the applicant in 1933 was questioned. The Court stated on page 146 (305 U.S.), p. 93 (83 L. Ed.):

> "The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. *Milliken* v. *United States*, 283 U.S. 15, 21, 75 L. ed. 809, 814, 51, S. Ct. 324, and cases cited. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among

* Referred to as page 8 of brief.

> those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute."

Property taxes and benefit assessments on real estate may be retroactively applied. *Wagner* v. *Leser,* 239 U.S. 230, 60 L. Ed. 206. The Court in its opinion stated:

> "It is first contended that the complainant is deprived of its property without due process of law, because the special assessment levied upon its property is for the special benefits long since accrued, and that the statute under consideration is retrospective in its operation, thereby disturbing rights which had accrued to and become fixed in the property holders long before the passage of the statute; that the state had no authority because of benefits thus long since conferred to make the assessment in question. But we deem this contention foreclosed by the decision of this court in *Seattle* v. *Kelleher,* 195 U.S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44." (239 U.S. 236)

Furthermore, it has been held that a delinquent taxpayer has no vested right in the existing mode of collecting taxes. 51 Am. Jur., p. 833—*League* v. *Texas,* 184 U.S. 156, 46 L. Ed. 478, 224 S. Ct. 475.

In the case of *United States* v. *Hudson,* 299 U. S. 498, 81 L. Ed. 371 (1937), the Court upheld the validity of the silver purchasing act which was made applicable to transfers made on or after May 15, 1934, and prior to the date of the act (June 19, 1934). The silver had been purchased by Hudson on May 3, 1934, and sold by him on May 23

and May 29, 1934, all the transactions having been concluded before the enactment of the statute.

Appellant urges this Court to adopt a rule to the effect that a so-called retroactive tax is unconstitutional when the following two conditions are met:

> "(a) if the taxpayer did not have a reasonable expectation that the tax would be imposed on the transaction or condition in question; and
>
> "(b) if the taxpayer could reasonably have been expected to have avoided the tax if he had anticipated its imposition."

We do not agree that such a rule has been established by the reported cases nor do we believe that this Court would be justified in enunciating such a rule. We believe that such anticipation by the taxpayer is wholly immaterial to the issues presented in this case.

Appellant relies on the cases of *Nichols* v. *Coolidge*, 274 U.S. 531 (1927), *Blodgett* v. *Holden*, 275 U.S. 142 (1927) and *Untermyer* v. *Anderson*, 276 U.S. 440 (1928), in which the Court declared the retroactive application of gift tax statutes unconstitutional. Brief, page 8. The case of *Cooper* v. *United States*, 280 U.S. 408 (1929), which is one of the leading cases on the subject and which was decided *after* the two cases listed above. The circumstances of this case were somewhat similar to those of the case at bar, especially in reference to the time element. Mrs. Cooper acquired stock from her husband by gift on November 1, 1921. The gift became vested and absolute on that date. Thereafter, on November 23, 1921, Congress enacted the revenue act effective January 1, 1921. An assessment was made pursuant to the said statute. The taxpayer (Mrs. Cooper) maintained that this was invalid under the due process clause of the Fifth Amendment.

In holding that the tax statute was valid, the Court, through Mr. Justice McReynolds, stated:

> "That the questioned provision cannot be declared in conflict with the Federal Constitution, merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross income, has not been open to serious doubt since *Brushaber* v. *Union P.R. Co.* 240 U.S. 1, 60 L. ed. 493, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713, and *Lynch* v. *Hornby,* 247 U.S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543.
>
> "*Nichols* v. *Coolidge, supra,* held arbitrary and capricious a statute which required executors to pay an excise ostensibly laid upon the transfer of property by death, but reckoned upon its value plus the value of other property conveyed by the decedent before the enactment in entire good faith and without contemplation of death, and said that to enforce it would amount to confiscation. *Blodgett* v. *Holden,* 275 U.S. 142, 72 L. ed. 206, 48 Sup. Ct. Rep. 105, and *Untermyer* v. *Anderson, supra,* considered the validity of an enactment which laid a tax upon donors because of gifts fully consummated prior to its passage. We held this was beyond the power of Congress. None of these cases is in point; they gave no consideration to the power of Congress to require that taxable income should include profits from transactions consummated within the year.
>
> "We can find nothing unusual, arbitrary, or capricious in the provision of the taxing act here involved, and the judgment of the court below must be affirmed." (280 U.S. 411-412)

In the case of *Penn-Dixie Cement Corp.* v. *Kizer,* 250 S.W. (2d) 904, 194 Tenn. 412 (1952), the Court sustained the validity of an assessment of an excise tax under a statute which was allegedly retroactive or retrospective

in operation. On January 31, 1951, the statute, imposing an excise tax on corporations for the privilege of doing business in Tennessee measured by the corporation's net earnings for the preceding year, was amended in such a manner as to eliminate the deduction of federal taxes on income or excess profits in computing the net earnings subject to taxation under the statute. The amendment further provided that all taxes *due* on or before July 31, 1951, shall be computed in accordance therewith. Under the statute corporations were required to file a verified report of their net earnings for the preceding year on or before July first of each year and pay the tax at that time. The amendment to the statute provided that the same "shall take effect from and after its passage." The taxpayer brought an action to recover $21,152.03, the additional amount paid resulting from the amending of the statute. It was contended by the taxpayer: (1) that the application of the amendment to earnings made during 1950 violated the provision of the Constitution of Tennessee which prohibits retrospective legislative laws that disturb vested rights and (2) that such application of the amended statute was so "oppressive and arbitrary as to be a denial of due process under the Fourteenth Amendment to the Constitution of the United States." The Supreme Court of Tennessee affirmed the judgment of the trial court denying relief to the taxpayer. In the course of its opinion the Court stated:

> "Contention is made by appellant that the Act is not only void as being retroactive in effect but violates 'due process' under the Federal Constitution. We cannot sustain either of these contentions as being sound.
>
> "Conceding that the Act is in a degree retroactive, or retrospective, this does not in and of itself render it invalid, since in our opinion it does not impair the

obligation of a contract or operate to divest rights to any vested interest. Taxing statutes are generally held to be constitutional even though they have some retroactive effect. *Millikin* v. *U.S.*, 283 U.S. 15, 21, 51 S. Ct. 324, 75 L. Ed. 809 and *Welch* v. *Henry*, 305 U.S. 134, 59 S. Ct. 121, 118 A.L.R. 1142.

" 'Mere retroactivity of a statute affecting taxation does not render it unconstitutional; such a statute is valid if it is not arbitrary, and does not disturb vested rights, impair contractual obligations, or violate due process.' 16 C.J.S., Constitutional Law, § 419.

* * * *

"We find no merit in the fifth assignment of error complaining that the tax as construed by the Commissioner is 'so oppressive and arbitrary' as to be a denial of due process under the Fourteenth Amendment of the United States Constitution. The Federal decisions cited on the appellant's brief, *Nichols* v. *Coolidge*, 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, and others do not control the question before us. On the contrary the case most applicable and controlling, as pointed out by opposing counsel, is *United States* v. *Hudson*, 299 U.S. 498, 500, 57 S. Ct. 309, 310, 81 L. Ed. 370, wherein it is said:

> " 'As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process of law clause of the Constitution.' " (250 S.W. (2d) 909-910)

On page 9 of brief counsel for appellant quotes from an article by Charles B. Hochman entitled: "The Supreme Court and the Constitutionality of Retroactive Legisla-

tion." 73 Harv. L. Rev. 692, 727 (1960). This is a comprehensive article on the subject of retroactive legislation generally. Only five and one-half pages of the thirty-four pages deal with the subject of Retroactive Taxation, pages 708-711, inclusive. We quote from that work beginning on page 706:

> "*Retroactive taxation.*—Cases involving the retroactive imposition of taxes must be treated separately. The Court has been extremely reluctant to override the legislative judgment as to the necessity for retroactive taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it. Indeed, as early as 1935 one commentator observed that 'arbitrary retroactivity may continue . . . to rear its head in tax briefs, but for practical purposes, in this field, it is as dead as wager of law.' Nevertheless, a discussion of these cases is here included because it illustrates the niceties involved when the Court applies a single factor in determining the validity of retroactive legislation.
>
> "The primary consideration which appears from an analysis of the cases involving retroactive taxation is the ability of the taxpayer, at the time of the transaction in dispute, reasonably to have foreseen that a tax would be imposed, and the *likelihood that, having been able to foresee it,* he *could have altered* his *conduct to avoid* the *tax. Under this standard, no federal income tax has ever been held invalid on the ground that it was retroactive.* It is thought that the taxpayer, even if he had known that the tax would be imposed, would have received the income; therefore, it is not unfair to impose the tax since the taxpayer in no way relied on the nontaxability of the income. Accordingly, several statutes taxing all income re-

> ceived during a calendar year have been sustained even though enacted during the latter part of the year, and one state statute removing the exemption granted for dividends received was upheld as applied to a tax year ending almost fifteen months prior to its passage. Although the taxpayer may have changed his position by spending money he would have allocated to the payment of the tax had he known it would be imposed, it seems unlikely that the Court would find this argument determinative unless the tax were imposed on income received several years prior to the statute. It should be noted that the rule applied to yearly income taxes has also been applied to special income taxes imposed on the profit made from a particular transaction. Thus a fifty per cent tax on profits made from transactions in silver was held constitutional although its effective date was thirty-five days prior to its enactment. Similarly, the Renegotiation Act, which provided for recovery by the United States of excess profits realized by subcontractors, under government war contracts, was held valid as applied to subcontracts entered into prior to its enactment and on which final payment had not yet been made." (Italics supplied)

The appellant has failed to cite one case decided by the Supreme Court of the United States or a lower federal court where the rule he urges this Court to adopt has been approved. To the contrary, the very authority he cites (The Supreme Court and the Constitutionality of Retroactive Legislation by Charles B. Hochman, *supra*) states that no federal income tax has ever been held invalid under this standard. (The ability of the taxpayer, at the time of the transaction in dispute, reasonably to have foreseen that a tax would be imposed, and the likelihood that, having been able to foresee it, he could have altered his conduct to avoid the tax.)

Counsel has referred the Court to the following cases on page 9 of the brief: *Cohan* v. *Commissioner,* 39 F. 2d 540 (2d Cir. 1930); *Wilgard Realty Co.* v. *Commissioner,* 127 F. 2d 514 (2d Cir. 1942); *United Business Corp. of America* v. *Commissioner,* 62 F. 2d 754 (2d Cir. 1933); *Prather* v. *Commissioner,* 322 F. 2d 931 (9th Cir. 1963). None of these cases approve the rule appellant urges this Court to adopt. The validity of the tax statutes, though retroactive, was sustained in those cases. Judge Catterall, who issued the opinion on behalf of the State Corporation Commission, discusses and analyzes each of these cases. In this connection, the Court's attention is invited to pages 32, 33 and 34 of Record No. 6051 (Red).

Appellant's argument in this connection (An Unexpected Retroactive Tax That Would Have Been Avoided Is Unconstitutional) is effectively answered by the Supreme Court of Appeals in its opinion on pages 231 to 232 inclusive, 145 S.E. (2d); on pages 520 to 522 inclusive, 206 Va. and on pages 22 to 26 inclusive of Appendix A attached to Statement As To Jurisdiction filed by the appellant.

II.

The State is Not Prohibited by the United States Constitution in Levying Taxes on All Money and Intangibles of the Appellant.

The second contention made by the appellant is:

> An Unexpected Retroactive Tax That Would Have Been Avoided Is Unconstitutional.

The appellant argues that inasmuch as its intangible property and money allegedly have a commercial domicile in the State of Georgia, the State of Virginia, the State of

incorporation, is thereby precluded (prohibited) under the Constitution of the United States from taxing these same intangibles and money. Commissioner Catterall answers this argument fully and completely on pages 26 to 32 of the record.

On page 11 of its brief appellant states:

> "No Supreme Court case has ever held that a State of incorporation may levy a property tax on all intangibles of its corporation wherever located and regardless of a commercial domicile established outside that State."

We have always been under the impression that a State did not have to look to the Federal Constitution for powers it sought to exercise. Our concept of constitutional law has always been that a State could exercise those powers it saw fit unless expressly prohibited by its own Constitution or by the Constitution of the United States.

In what case has the Supreme Court of the United States expressly held that the State of incorporation is prohibited from taxing intangibles of a corporation which has acquired a situs at "commercial domicile" outside said State?

If there has been such a case decided, we have been unable to find it.

In this connection, appellant relies on the case of *Wheeling Steel Corporation* v. *Fox*, 298 U.S. 193 (1936). That case did not hold that the State of incorporation was prohibited from taxing intangibles having a commercial domicile in another State. All it held was that West Virginia had the authority to tax the intangibles of the corporation (which was incorporated in Delaware) where it was shown that such intangibles had a commercial situs in West Virginia. Delaware was not a party to the suit. To

understand the purport of the *Wheeling* case it is necessary to consider it in the light of the cases then recognized to be controlling and which have long since been repudiated by the Supreme Court of the United States. Those cases culminating in *First Nat. Bank* v. *Maine*, 284 U.S. 312 (1932)), held that intangibles should enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. In other words, during that era the Supreme Court held that to tax the same intangibles in two States was contrary to the due process clause and the ancient doctrine of "mobilia sequuntur personam" did not apply to intangibles when it is shown that the intangibles have not followed the owner and have acquired situs elsewhere. However, as pointed out by Commissioner Catterall, Record 6051, p. 26, and by the Supreme Court of Appeals, 145 S.E. 2d 233, 206 Va. 524-5 the Court in the case of *Curry* v. *McCanless*, 307 U.S. 357 (1939) held that both States could tax the securities owned beneficially by a citizen of Tennessee and held in trust by an Alabama trustee. In the course of the opinion the Court stated:

> "The taxpayer who is domiciled in one State but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. (Citing authorities, including *Wheeling Steel Corporation* v. *Ford*, 298 U.S. 193.) *But taxation of a corporation by a State where it does business, measured by the value of the intangibles used in its business there, does not preclude the State of incorporation from imposing a tax measured by all its intangibles. Cream of Wheat Company* v. *Grand Forks County, supra*, 253 U.S. 329" (307 U.S. 368) (Italics supplied)

An examination of the opinion in *Cream of Wheat Company* v. *County of Grand Forks*, 253 U.S. 325 (1920),

indicates there is no constitutional prohibition against a State taxing intangible property of a corporation although the physical property and *business* of the corporation are entirely in another State. In that case, the Court stated in its opinion:

> "The limitation imposed by the 14th Amendment is merely that a state may not tax a resident for *property* which *has acquired a permanent* situs beyond its boundaries.
>
> * * *
>
> "The limitation upon the power of taxation does not apply even to tangible personal property without the state of the corporation's domicile, if, like a sea-going vessel, the property has no permanent situs anywhere. *Southern P. Co.* v. *Kentucky*, 222 U.S. 63, 68, 56 L. ed. 96, 32 Sup. Ct. Rep. 13. Nor has it any application to intangible property (citing cases), even though the property is also taxable in another state by virtue of having acquired a 'business situs' there (citing cases)." (253 U.S. 328, 329) (Italics supplied).

We have found no case decided by the Supreme Court of the United States which overrules the *McCanless* case, *supra*. Subsequent decisions indicate that the doctrine asserted in the *Cream of Wheat* case, *supra*, and reconfirmed in the *McCanless* case have been followed.

The case of *Newark Fire Insurance Company* v. *State Board of Appeals*, 307 U.S. 313, was decided the same day that the case of *Curry* v. *McCanless, supra*, (May 29, 1939).

In a concurring opinion by Justice Frankfurter, joined in by Justices Black, Stone and Douglas, the following statement is made:

"It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended.

"Chapter 236 of the New Jersey Laws of 1918, as applied to the circumstances of these two cases, clearly does not offend the Constitution. In substance, such legislation has heretofore been found free from constitutional infirmity. *Cream of Wheat Co.* v. *Grand Forks County,* 253 U.S. 325, 64 L. ed. 931, 40 S. Ct. 558, affirming 41 N.D. 330, 170 N.W. 863. During all the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered since that case was decided, *the extent* of a state's *taxing power over a corporation of its own creation,* recognized in the *Cream of Wheat Co.* case *has neither been restricted* nor *impaired.*" (307 U.S. 324) (Italics supplied)

Hence, it is clear that the rule laid down in the *Cream of Wheat* case, *supra,* to-wit, that the State of incorporation may tax the intangible property held by the corporation although its entire business is carried on outside the State of incorporation, is now recognized by the Supreme Court of the United States.

Three years after *McCanless* and *Newark Fire Insurance* the case of *State Tax Commission of Utah* v. *Aldrich,* 316 U.S. 174 (1942), reached the Supreme Court. In that case, the respondent's decedent was a resident of New York where he was domiciled at the time of his death. His estate was probated in New York. Included in the estate were shares of stock issued by the Union Pacific Railroad Company. The railroad company was a Utah corporation. The shares of stock were actually held in New York. The railroad company kept its books, records and transfer agents in New York where all transfers of stock were actually made. Nothing was done relative thereto in Utah.

The shares of stock were the only property of the decedent claimed to be within the jurisdiction of Utah. The State of Utah sought to tax the transfer of the stock. The Supreme Court of Utah disallowed the tax under the compulsion of *First National Bank* v. *Maine, supra.* The United States Supreme Court reversed, holding that the State of Utah could tax the transfer of these shares of stock. In the course of the decision, the Court stated:

> "For the reasons stated we do not think that *First Nat. Bank* v. *Maine* should survive. We overrule it. In line with our recent decisions in *Curry* v. *McCanless, Graves* v. *Elliott* and *Graves* v. *Schmidlapp* we *repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one state.* In case of shares of stock 'jurisdiction to tax' is not restricted to the domiciliary State. *Another State* which has extended benefits or protection or *which can demonstrate* 'the practical *fact of its power*' or *sovereignty* as respects the shares (*Blackstone* v. *Miller,* 188 US p. 205, 47 L ed 444, 23 S Ct 277) *may likewise constitutionally make its exaction.* In other words, we *restore* these intangibles to the *constitutional status* which they occupied up to a *few years ago.* See *Graves* v. *Shaw,* 173 Mass. 205, 53 NE 372; *Larson* v. *MacMiller,* 56 Utah 84, 189 P 579; and cases collected in 42 ALR pp. 365 et seq." (Italics supplied).

Hence, what was dictum in *McCanless* became the expressed ruling of the Court in *Aldrich;* that is to say, there is no constitutional restriction on different States taxing the *same* intangible property at the *same* time.

Appellant concedes on page 11 of its brief that the cases cited in the opinion of the State Corporation Commission (R. 24-29) establish that the State of domicile has the

power to tax intangibles. Quoting from the brief on page 11:

> "There was no question of commercial domicile in *Central Hanover* and *Greenough* since those cases involved domiciles of individuals, and not the multi-state problems of corporate operations."

Thus appellant would treat a corporation differently from an individual where the domicile becomes a factor in levying taxes.

Mr. Justice Reed in the case of *Newark Fire Insurance Company* v. *State Board, supra,* stated in the opinion sustaining the tax:

> "When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the jurisdiction, of its creator. There it must dwell. The dominion of the state over its creature is complete." (307 U.S. 318)

The Court, in unequivocal language, stated in the *Cream of Wheat* case, *supra:*

> "The company was confessedly domiciled in North Dakota, for it was incorporated under the laws of that state. As said by Mr. Chief Justice Taney: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' *Bank of Augusta* v. *Earle,* 13 Pet. 519, 488, 10 L. ed. 274, 307. The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile." (253 U.S. 328)

The doctrine enunciated therein was, as we have seen, reaffirmed in the *Newark Fire Insurance Company* case (307 U.S. 324).

Although we deem it immaterial to the issue presented in this case whether the intangibles and cash of the appellant had a so-called "commercial domicile" in Georgia as claimed by the appellant, an examination of the evidence before the Commission indicates that these intangibles and money were not localized to Georgia or to New York, as were the intangibles localized to West Virginia in the *Wheeling Steel* case, *supra*. There was no showing that those intangibles and money were produced by business carried on in Georgia or in New York.

Mr. Carter, the assistant treasurer of appellant, states the source of these funds. We quote from his testimony on pages 14 and 15 of the Record:

> "Q. The first page of this exhibit shows, I believe, about twenty-two million dollars of cash or certificates of deposit of Colonial Pipeline?
> "A. Yes.
>
> "Q. Mr. Carter, what was the source of those funds?
> "A. These were funds secured on long-term loans from financial institutions.
>
> "Q. For what purpose were they secured?
> "A. For the construction of lines.
>
> "Q. Where were they secured?
> "A. In New York City.
>
> "Q. And where were they closed?
> "A. In New York City.
>
> "Q. And all of those were with financial institutions?
> "A. Yes.
>
> "Q. Turning to the next page, that shows about twenty-three or twenty-four million dollars of notes.

What was the source of the money represented by those notes?

"A. This money was also obtained from the same loans made by these financial institutions."

Appellant for its own convenience kept these funds in New York City and in Atlanta. Such keeping did not localize them in the sense to give them a commercial domicile in those States. In the case of *Standard Oil Company* v. *Commonwealth,* 311 S.W. (2d) 372 (Kentucky), relied upon so heavily by appellant, the factual situation was entirely different. There the tax was upon accounts and notes receivable derived from the business operated by Standard in other States and in bank deposits derived from accounts receivable and notes. The operation of the business was separate in each State. We submit that even if the rule in the *Wheeling Steel* case, *supra,* as appellant construes precludes the taxing of intangibles in another State (which rule incidently has long been discarded by the Supreme Court), the evidence in this case fails to establish such a commercial domicile.

The mere holding of these intangibles and money in New York and Georgia does not preclude the State of Virginia from taxing them. Virginia has and had at that time (January 1, 1964) complete control over appellant and could have forced appellant to use these intangibles and money to satisfy any claim which may have been made against appellant. By being incorporated in Virginia as a public service corporation and exercising the right of eminent domain, appellant subjected itself to control by Virginia. Mr. Justice Douglas in the *Central Hanover Bank & Tr. Co.* v. *Kelly,* 319 U.S. 94 (1942), aptly stated:

"The command of the state over the owner, the obligations which domicile creates, the practical necessity of associating intangibles with the person of the owner

at his domicile since they represent only rights which he may enforce against others—these are the foundation for the jurisdiction of the domiciliary state to tax." (319 U.S. 96-97)

As heretofore stated, counsel for appellant relies heavily on the decision in the case of *Standard Oil Company* v. *Kentucky, supra.* Commissioner Catterall is criticized for ignoring it. Brief, p. 28. In that case, it was admitted by the taxing authorities of Kentucky that the intangible property sought to be taxed had a business situs (taxable situs) in other States. The decision is largely based on the *Wheeling* case which in turn was founded on the case of *First National Bank* v. *Maine, supra,* notwithstanding the repudiation of the latter. The author of the opinion sought to distinguish between an *ad valorem* tax on intangibles from *succession* or *inheritance* taxes, taxes on transfer of *corporate* stock or *license taxes* measured by the value of the tax, holding that the tax was invalid solely because it was an *ad valorem* tax.

It seems that the Kentucky Court had many years before (1936) held that an *ad valorem property tax* on intangible property of a resident where the intangibles had a business situs in another State was invalid, following *Wheeling Steel* case which had been decided earlier that year (1936).

The Kentucky Court, in the *Standard Oil* case, simply followed its former ruling, apparently ignoring the decision of the Supreme Court of the United States in the case of *Greenhough* v. *Tax Assessors,* 331 U.S. 486 (1947). In that case, the decedent died a resident of New York. His will was probated in that State. Trustees under the will held intangible personalty for the benefit of a named beneficiary for her life. The evidence of the intangible property was in New York. One of the trustees lived in Newport, Rhode Island.

That city made an assessment against one-half of the intangible personal property (corpus of the trust) under the Rhode Island statute for *ad valorem taxes*. The Court sustained the right of the city of Newport to tax. The discussion and determination in the opinion was restricted to the issue presented by appellant's insistence that Rhode Island could not constitutionally collect this tax because the State rendered no equivalent for its exaction in protection of or benefits to the trust fund. In the course of its opinion, the Court stated:

> "* * * But when testamentary trustees reside outside of the jurisdiction of the courts of the state of the seat of the trust, third parties dealing with the trustee on trust matters or beneficiaries may need to proceed directly against the trustee as an individual for matters arising out of his relation to the trust. Or the resident trustee may need the benefit of the Rhode Island law to enforce trust claims against a Rhode Island resident. As the trustee is a citizen of Rhode Island, the federal courts would not be open to the trustee for such causes of action where the federal jurisdiction depended upon diversity. The *citizenship of the trustee* and not the seat of the trust or the residence of the beneficiary is the controlling factor. The trustee is suable like any other obligor. There is no provision of the federal Constitution which forbids suits in state courts against a resident trustee of a trust created under the laws of a sister state. Consequently, we must conclude that *Rhode Island does offer benefit and protection through its law to the resident trustee as the owner of intangibles.* And, while it may logically be urged that these benefits and protection are no more than is offered a resident owner of land or chattels, permanently out of the state the same reasons, hereinbefore stated on page 1627 (331 U.S. 491-3) apply that permit state property taxation of a resident owner of intangibles while denying

a state power to tax similarly the resident's out-of-state realty." (331 U.S. 495-496) (Italics supplied)

We believe that there is a true analogy between appellant and the Rhode Island trustee in the *Greenhough* case. Here, appellant has the right of eminent domain which it has exercised extensively throughout Virginia. Landowners who have had their land taken by appellant must seek redress in the Virginia courts to enforce payment if necessary. The entire assets of appellant, if need be, may be subjected to the payment of such claims. Virginia courts have the authority to compel appellant to apply these assets (held in Georgia and in New York) to the satisfaction of any claim adjudicated against it. Thus, appellant may need the benefit of Virginia law in asserting its right under Virginia law or to defend an action instituted against it in the courts of Virginia. Surely, Virginia offers as much protection to appellant as Rhode Island did to the resident trustee in the *Greenhough* case. Virginia has control over appellant and its intangible property regardless of where the evidence of that property may be. *Central Hanover Bank* v. *Kelley, supra.*

Likewise, the Kentucky Court failed to consider the decision of the *Newark Fire Insurance* case, *supra.* Furthermore, the Kentucky Court attempted to distinguish between direct taxes on property (*ad valorem* taxes), inheritance taxes, taxes on the transfer of corporate stock privilege or license taxes. Regardless of how the taxes are denominated, such taxes are taxes on intangible property. We do not believe that from a constitutional standpoint a line can be drawn delineating one type of intangible property from another. The United States Supreme Court has not gone into such technicalities in tax cases, as illustrated in the case of *Fidelity Casualty Company* v. *Louisville,* 245 U.S. 54, where the Court used this language:

"It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be involved in a case like this. Whichever this tax technically may be, the authorities show that it must be sustained." (245 U.S. 59)

Under the circumstances, we cannot possibly see how this Court would be justified in following the decision of the Kentucky Court in the *Standard Oil Company* case.

Appellant's argument in this connection (A State May Not Tax Intangibles Of Its Corporation That Have Acquired Commercial Domicile Elsewhere) is effectively answered by the Supreme Court of Appeals in its opinion on pages 231 to 232, inclusive, 145 S.E. (2d) on pages 522 to 525, inclusive, 206 Va. and on pages 22 to 26, inclusive, of Appendix A attached to Statement As To Jurisdiction filed by the appellant.

III.

Section 58-588 of the Code of Virginia (1950), as amended, Not Shown to be Unconstitutional.

This Court is asked by the appellant to declare Section 58-588 of the Code contrary to the Fourteenth Amendment.

It is well to consider the statement made by Mr. Justice Frankfurter in the concurring opinion in the *Aldrich* case, *supra*. After citing several sections of the original Constitution limiting the power of the states to tax in some areas, he had this to say:

"* * * None of these limitations touches the power of a State to create corporations and the incidental power to tax opportunities which such State-created corporations afford.

"This phase of the taxing power, rooted in the established practices of the States in common with

> other governments, was not suddenly abrogated on July 29, 1868, when the Fourteenth Amendment became the law of the land. On the contrary, taxes based on the States' power over corporations of their own creation thereafter became an increasingly familiar source of revenue." (316 U.S. 182-3)

The legislature of Virginia has spoken in clear and unequivocal language just what its intent is in this particular.

In cases of this nature, fundamental principles in our system of laws should be followed. The rule that a statute is presumed to be constitutional and a court will not hold a statute unconstitutional unless it is unconstitutional beyond a reasonable doubt, should never be ignored by a court.

In *Ogden* v. *Saunders,* 12 Wheat. 213, 270, 6 L. ed. 606, 625, it said with respect to a state statute:

> "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."

In the case of *Union Pacific Railroad Company* v. *United States,* 99 U.S. 700, 718, 25 L. ed. 496, 501, the court said with respect to an act of Congress:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

CONCLUSION

Appellant on its own volition became a public service corporation incorporated under the laws of Virginia and thereafter exercised the rights and privileges accorded such corporations, which included, among other rights, the power of eminent domain. It now feels that it is aggrieved by the action of the State of Virginia in taxing it in the same manner as other public service corporations of like character are taxed. Appellant states that the payment of such taxes is oppressive. It could hardly be said that the tax of some $160,000 is oppressive to a corporation possessed of some $65,900,000.00 in tangible securities and money in working capital. The Supreme Court of Appeals of Virginia, as well as the State Corporation Commission, did recognize the basic principle relative to the imposition of retroactive taxes and the basic principle relative to the power of a State to tax intangibles as enunciated by this Honorable Court. Appellant has not been treated unfairly by the State of Virginia.

We submit that there was no error committed by the Court. This Court should deny the petition for an appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Response to H. Brice Graves, Esq., Ralph H. Ferrell, Jr., Esq., John W. Riley, Esq., and Richard G. Joynt, Esq., 1003 Electric Building, Richmond, Virginia 23212, Jack Vickrey, Esq., Howard D. McCloud, Esq., and Ross Arnold, Esq., 3390 Peachtree Road, N.E., Atlanta, Georgia, counsel for the appellant, on this 19th day of April, 1966.

D. GARDINER TYLER
Assistant Attorney General

APPENDIX

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CHAPTER 217

An Act to amend and reenact §§ 58-588, as amended, 58-597 and 58-598 of the Code of Virginia, relating to taxes on certain public service companies.

[H 640]

Approved March 10, 1964

Be it enacted by the General Assembly of Virginia:

1. That §§ 58-588 as amended, 58-597 and 58-598 of the Code of Virginia be amended and reenacted as follows:

§ 58-588. Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit natural gas *or crude petroleum and the products or by-products thereof* in the public service by means of a pipe line or pipe lines in this State which pays no State franchise tax on its gross receipts on account of the transmission of such natural gas *or crude petroleum and the products or by-products thereof* shall report annually on or before the fifteenth day of April to the State Corporation Commission all of its real and personal property of every description, tangible and intangible, as of the beginning of the first day of January preceding, showing particularly in what city, town or county and school district therein the property is located. This report shall be itemized as provided for herein. Each such corporation shall also report the total miles of mains located in this State.

The report herein required shall be verified by the oath of the president or other proper officer or person making the same.

This section as amended shall apply to the tax year beginning on January first, nineteen hundred sixty-four and to each tax year thereafter.

§ 58-597. Every corporation coming within the provisions of this article shall pay to the State an annual State

franchise tax on its privilege to exist with the powers aforesaid as a body corporate in this State equal to two hundred and fifty dollars for each county in or through which it is authorized by its charter to locate a pipe line or pipe lines for the transmission of natural gas *or crude petroleum and the products or by-products thereof* in this State, which, with the taxes hereinbefore provided for, shall be in lieu of all State taxes or license charges whatsoever upon the franchises of such corporations, in so far as such franchises relate to the authority to transmit natural gas *or crude petroleum and the products or by-products thereof* by means of a pipe line or pipe lines in this State and the shares of stock issued by it and upon all its property, except as herein provided; provided that nothing herein contained shall exempt such corporation from the annual fee required by section one hundred and fifty-seven of the Constitution or from the county, city, town, district or road levies; and provided, further that nothing contained in this article shall be construed as exempting from liability for a State franchise tax on gross receipts derived from the business of distributing and selling natural gas *or crude petroleum and the products or by-products thereof* in this State any such corporation as comes within this article when such corporation is engaged in the business of selling and distributing natural gas *or crude petroleum and the products or by-products thereof* in this State.

The real estate and tangible personal property of such corporation but not its franchise, shall be assessed on the valuation fixed by the State Corporation Commission, with county, city, town, district and road levies at the same rates as real and personal property of natural persons are assessed with such levies.

This section, as hereinabove amended, shall apply to the tax year beginning on January first, nineteen hundred sixty-

four; but it shall not apply to any succeeding tax year, and for the tax year beginning on January first, nineteen hundred sixty-five and for each tax year thereafter every such corporation coming within the provisions of §58-456 shall pay the franchise tax imposed by that section. § 58-600 shall become inoperative after December thirty-first, nineteen hundred sixty-four.

§ 58-598. No * county, city, town, district or road levy shall be laid on the net income of any such corporation, nor shall any county, city, town, district or road levy be laid on the gross receipts of any such corporation derived solely from the transmission of natural gas *or crude petroleum and the products or by-products thereof.*

Nothing contained in this article shall be construed as exempting any such corporation from the State income tax imposed by Chapter 4 of Title 58 for taxable years beginning after December thirty-first, nineteen hundred sixty-four; and any such corporation shall not be subject to a State gross receipts tax under § 58-603 except to the extent that the receipts of such corporation are derived from the business of distributing and selling natural gas in this State.

This section as amended shall apply to the tax year beginning on January first, nineteen hundred sixty-four and to each tax year thereafter, except that, as to the State income tax, it shall apply to taxable years beginning after December thirty-first, nineteen hundred sixty-four.

2. An emergency exists and this act is in force from its passage.

(NOTE: Italicized portions were added by the 1964 Amendment. Asterick indicates ommissions.)

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SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1965

No. 985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Dated: May 9, 1966

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

I

INTRODUCTION

The document filed on behalf of the Appellee in this case is not directed to the absence of a Federal question or to the fact that the Federal questions presented are not substantial. It is, in essence, a brief on the merits of the case. Although an effort will be made to reply to the document as if it were a motion, it will inevitably be necessary to focus more strongly on the merits of the case than is customary at this stage.

A few comments are, we believe, necessary as to the coloring material contained in the Motion. For example, the Appellee sets its tone by referring to the Appellant as "a huge corporation" (Motion, p. 5) that undertook a "vast program" (*Id.* at p. 7). Hopefully, the size of a corporation is not the standard by which the gluttony of tax gatherers is to be measured in Virginia. The public records of the State Corporation Commission of Virginia show that property owned in Virginia by other utilities is of much greater value than that of the Appellant; several have property assessed for taxation at amounts ten to twenty times that of the Appellant. The table on page 6 of the Motion makes these facts clear. All other utilities own property assessed at 88 times that of the Appellant; yet the Appellant paid a tax on intangible property that was equal to 92% of the taxes paid by all other utilities including railroads and a tax on money that was equal to 57% of the taxes paid by all other utilities including railroads. The figures used by the Appellee leave no doubt that, in relation, the Appellant is small but its taxes are large.

Next, the Appellee asserts that, because the State Cor-

poration Commission of Virginia held in October 1963 that it had

> ". . . no authority to regulate or tax petroleum pipeline companies."[1]

the Appellant should have known that such authority would be later conferred on it. The Appellee attempts to bolster this conclusion by excursions into facts far outside the record of this case (Motion, pp. 7-11). But the facts cited by the Appellee lead to the opposite conclusion, for the Appellant thought the matter at rest after the Commission acted. And the record of this case is directly to the contrary of the conclusion advanced by the Appellee (R. 15-16).

Of course, later on (Motion, p. 15), the Appellee calls the reasonable expectation of the Appellant "wholly immaterial". But it is, we submit, a relevant circumstance in measuring a retroactive tax against the Fourteenth Amendment. To that point, we now turn.

II

RETROACTIVITY

The Appellee disagrees with the proposition that was advanced by the Appellant that a retroactive tax is unconstitutional when its imposition could not have been reasonably anticipated and, had it been, the tax would have been legally avoided. The Appellee says:

> "We believe that such anticipation by the taxpayer is wholly immaterial to the issues presented in this case." (Motion, p. 15)

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[1] *Commonwealth* v. *Colonial Pipeline Co.*, 1963 S.C.C. Va. Rep. 83, 84.

Yet that is the rule established by Hochman and quoted by both the Appellant and the Appellee.[2] And it is the basis for the decision by this Court in the gift tax cases.[3] It was the fact that the tax could not reasonably have been anticipated that made the statute offensive to constitutional limitations.

The Appellee then seeks to imply that the gift tax cases have been overruled by *Cooper* v. *United States,* 280 U.S. 409 (1930). That case does *not* involve a gift tax; it involves the income tax, the income tax basis of property received as a gift. That is clear from the quotation from the opinion of this Court that is contained in the Motion (p. 16).

The income tax cases are entirely distinguishable from this case on their facts. Income taxes are revised annually, and no taxpayer can reasonably say that he does not anticipate changes in the income tax statutes during the course of the tax year. But even more than that, a taxpayer has no acceptable alternative to payment of the tax. One does not forego income simply because it may be taxed at a higher rate; for that reason, an income tax may properly have retroactive aspects. That is the rule of *Welch* v. *Henry,* 305

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[2] Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv. L. Rev. 692, 706 (1960), Statement as to Jurisdiction, p. 9, Motion 1, pp. 18-20.

[3] *Blodgett* v. *Holden,* 275 U.S. 142 (1927); *Untermyer* v. *Anderson,* 276 U.S. 440 (1928). One is struck by certain comments made in the Motion. As to these cases, the Appellee says:

> ". . . the statutes have been applied to transactions (gifts) which have been consummated and the property vested thereby years and years before the legislation was enacted. . . ." (Motion, p. 13).

In *Blodgett* the gift was made in January, 1924; in *Untermyer* the gift was made on May 23, 1924. In each case, the unconstitutional statute became effective on June 2, 1924.

U.S. 134 (1938). If the taxpayer has a reasonable expectation that the transaction will be taxed when he engages in it,[4] or if he is given a chance to avoid the tax and fails to avail himself of it,[5] or if he would not have changed his course of action had he anticipated the tax,[6] then the tax may be retroactively imposed.

But in this case, the Appellant had no way to anticipate imposition of the tax. Had it anticipated the tax, it would have avoided the tax by investing its funds in Federal bonds, notes and bills which are not subject to the tax. When the tax was in fact levied, it was not provided with any means that it could use to avoid or minimize the tax.

The Appellee seeks to align this case with the income tax cases by asserting:

> "The General Assembly of Virginia always meets after January first. Nevertheless it revises the tax structure of Virginia so as to relate back to that date." (Motion, p. 11)

This is, in fact, just what the General Assembly of Virginia does *not* do. It almost never *levies* a tax retroactively.[7] Any implication that the Appellant should have anticipated

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[4] *United States* v. *Hudson*, 299 U.S. 498 (1937); *Wilgard Realty Co.* v. *Commissioner*, 127 F. 2d 514 (2d Cir. 1942).

[5] *Cohan* v. *Commissioner*, 39 F. 2d 540 (2d Cir. 1930); *United Business Corp. of America* v. *Commissioner*, 62 F. 2d 754 (2d Cir. 1933); *Prather* v. *Commissioner*, 322 F. 2d 931 (9th Cir. 1963).

[6] *Philip Wagner, Inc.* v. *Leser*, 239 U.S. 207 (1915). In this category also falls *Penn-Dixie Cement Corp.* v. *Kizer*, 194 Tenn. 412, 250 S.W. 2d 904 (1952), which involved the retroactive rescission of a deduction. This is entirely different from the imposition of a new tax. *Cf. Commissioner* v. *Sullivan*, 356 U.S. 27 (1958).

[7] A review of all tax statutes adopted by the General Assembly of Virginia from 1956 through 1964 reveals that no new tax was levied retroactively during this period. The only retroactive tax legislation

this tax because of comparable impositions by Virginia in the past cannot be supported within or outside the record.

The facts are very simple. The Appellant did not anticipate and could not have anticipated the tax.[8] Had it been sufficiently clairvoyant to have anticipated the tax, it would have avoided it. The failure to give it this opportunity for avoidance—an opportunity accepted by all other utilities—raises a very substantial question under the Fourteenth Amendment. That is a question that this Court should determine.

III

COMMERCIAL DOMICILE

The Appellee bases its argument in regard to this question on the fact that, in many cases, double taxation of intangibles does not offend constitutional limitations. Of course, this is true. But this case involves a factual situation where constitutional limitations are offended.

The Appellee places chief reliance on the dictum in *Curry* v. *McCanless*, 307 U.S. 357, 368 (1939), that the State of incorporation may impose on its corporation a tax measured by all of its intangibles (Motion, p. 23). But it is only

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related to income taxes and conferred benefits on taxpayers in general terms except:

(a) a statute changing the date for the payment of gift taxes that was made applicable to the current year but in fact required payment after its effective date; and

(b) a statute exempting certain businesses from the tax on capital.

The only other exception is the statute at issue in this case.

[8] If the statute had not been amended to impose the tax, the Appellant's intangible personal property and money would have been taxed only as capital and only to the extent that it had not acquired a business situs outside Virginia. Virginia Code, §§ 58-411, 58-415. The amount subject to this Virginia tax would have been $1,000 (R. 40).

fair, we consider, to point out again that this statement received the concurrence of less than a majority of the sitting Justices. Mr. Justice Reed specifically refused to agree with this conclusion (307 U.S. at p. 374). The language so sharply relied on by the Appellee was not the language of this Court.

In *Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193 (1936), this Court held that intangibles that had acquired a commercial domicile in West Virginia could be taxed by West Virginia even though their owner was incorporated by Delaware. In *Cream of Wheat Co.* v. *Grand Forks County*, 253 U.S. 325 (1920), this Court held that a State of incorporation might tax intangibles of its corporation wherever located. But the matter of commercial domicile in another State was not raised in that case and has not been found in any similar case more recently decided. The taxpayer attempted to prove commercial domicile outside New Jersey in *Newark Fire Insurance Co.* v. *State Board*, 307 U.S. 313 (1939), but this Court found as a fact that it failed to do so:

> "The facts presented by this record fall far short of this requirement." (*Id.* at p. 321)

State Tax Commission v. *Aldrich*, 316 U.S. 174 (1942), was a transfer tax on an individual, not a property tax on a business. And that is equally true of *Greenough* v. *Tax Assessors*, 331 U.S. 486 (1947), where the tax was levied on the property of a trustee, and only on his proportionate share of the property at that.

The Appellee seeks to explain away *Standard Oil Co.* v. *Kentucky*, 311 S.W. 2d 372 (Ky. 1958), simply on the ground that Kentucky is out of step with the world. The

only difference pointed out by the Appellee (Motion, p. 29) between that case and this is that, in *Standard Oil*, the intangibles arose from operations while here the intangibles arose in preparation for the commencement of operations. But that, we submit, is a distinction without a difference. The Kentucky court thought that intangibles with a business situs outside Kentucky could not be taxed by Kentucky. Commercial domicile presents a stronger case than mere business situs. It is clear from the Stipulation of Facts in this case that the commercial domicile of the intangibles of the Appellant was, within the *Wheeling Steel* definition, located in Georgia (compare R. 38-39 with 298 U.S. at pp. 205-206).

It will not do to dismiss *Standard Oil* merely on the ground that the Court of Appeals of Kentucky had not read the decisions of this Court during the preceding decade. *Standard Oil* presents a factual situation more nearly similar to the facts presented here than any other case that has been found. The Kentucky court held that mere incorporation in Kentucky did not justify Kentucky taxation of intangible "property located outside the State. . . ." (311 S.W. 2d at p. 376). That same ruling should bind Virginia. The failure of the Virginia court to recognize the Kentucky rule brings about a conflict between the highest courts of two States that deserves this Court's attention and action.

Finally, the Appellee enumerates at some length the great benefits that Virginia has conferred on the Appellant (Motion, p. 32). The Appellant has conferred a number of benefits on Virginia, especially in business development and taxable values of physical property. Insofar as these intangibles are concerned, the only benefit that Virginia has conferred on the Appellant is to levy the taxes at issue in this case, a benefit that the Appellant would gladly forego. The protec-

tion of the property subject to the taxes at issue here is derived from the law of Georgia.

If Virginia may tax all of these intangibles here, so may Delaware, the second State of incorporation, and so may Georgia, the commercial domicile of the intangibles. To permit Virginia to levy this tax "would too greatly exalt a minor factor"—place of incorporation. *Texas* v. *New Jersey*, 379 U. S. 674, 679-80 (1965). The *Standard Oil* rule denies Virginia's power to tax; this Court should review this case to enforce that rule in Virginia.

IV

CONCLUSION

The Appellee urges that it has not treated the Appellant unfairly (Motion, p. 35). This conclusion is sharply at variance with the facts. The facts recited on page 7 of the Statement as to Jurisdiction make the unfairness of Virginia's treatment of the Appellant manifest for all to see.

But that is not alone a reason for review by this Court. This case places in issue two substantial questions of constitutional law. These questions cannot be obscured by verbiage nor can they simply be disregarded. They remain questions of importance, questions that merit full consideration by this Court.

The motion to dismiss should be denied. Probable jurisdiction should be noted.

Respectfully submitted,

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Dated May 9, 1966

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Supreme Court of the United States

October Term, 1965

No. 985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

Appeal From The Supreme Court of Appeals of Virginia

RESPONSE TO BRIEF IN OPPOSITION TO MOTION TO DISMISS

In the Brief in Opposition to Motion to Dismiss, counsel has taken issue with the comment made by us on page 13 of our Response and Motion to Dismiss. We quote from the footnote on page 3 of the Brief in Opposition to Motion to Dismiss:

"*Blodgett* v. *Holden*, 275 U.S. 142 (1927); *Untermyer* v. *Anderson*, 276 U.S. 440 (1928). One is struck by certain comments made in the Motion. As to these cases, the Appellee says:

"'. . . the statutes have been applied to transactions (gifts) which have been consummated and the property vested thereby years and years before the legislation was enacted. . .' (Motion, p. 13).

"In *Blodgett* the gift was made in January, 1924; in *Untermyer* the gift was made on May 23, 1924. In each case, the unconstitutional statute became effective on June 2, 1924."

In making this comment, we, of course, had reference to the case of *Nichols* v. *Coolidge*, 274 U.S. 531, 74 L. Ed. 1184, on which the decisions of both *Blodgett* and *Untermyer* were grounded. The transactions (gifts in the form of conveyances of real estate) were completed and interest vested in 1907 and 1917. The Act of Congress was enacted on February 24, 1919. Mrs. Coolidge died in 1921. The same Act of Congress was under review in these two cases (*Blodgett* and *Untermyer*). In the latter case, Justices Brandeis, Holmes and Stone disagreed with the majority opinion which held that the Act of Congress was unconstitutional as violative of the due process clause of the Fifth Amendment. In the opinion of Justice Brandeis, a great number of cases sustaining the validity of retroactive tax statutes are cited. We find this succinct statement, "except for the peculiar tax involved in *Nichols* v. *Coolidge* . . ., no federal revenue measure has ever been invalid on the score of retroactivity." (276 U.S. 449).

We are unable to find where this Court has extended the doctrine in the *Blodgett* and *Untermyer* cases to cover all retroactive tax legislation. Our research indicates just the

opposite. See, pages 12 to 21 of our Response and Motion to Dismiss.

The petition for an appeal should be dismissed.

Respectfully submitted,

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Attorney General of Virginia

D. GARDINER TYLER
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

May 13, 1966

CERTIFICATION

I certify that copies of the foregoing Response to Brief in Opposition to Motion to Dismiss were mailed to H. Brice Graves, Esq.; Ralph H. Ferrell, Jr., Esq., John W. Riely, Esq., Richard G. Joynt, Esq., 1003 Electric Building, Richmond, Virginia 23212, Jack Vickrey, Esq., Howard D. McCloud, Esq., and Ross Arnold, Esq., 3390 Peachtree Road, N.E., Atlanta, Georgia 30326, counsel for the appellant, this 13th day of May, 1966.

D. GARDINER TYLER
Assistant Attorney General

END